92-1708
No. ____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

DEFENDER INDUSTRIES, INC., *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in a diversity case, a federal court is barred by the Seventh Amendment from reviewing an award of punitive damages under state law standards and procedures adopted to meet the constitutional concerns recognized in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991).

2. Whether an award of $5 million in punitive damages is constitutionally permissible in a case where (1) that penalty is at least 47 times greater than the actual injury inflicted and (2) the tort could never have caused any greater injury, was an isolated incident, and was readily detectible by the plaintiff.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit is unreported and reprinted at Pet. App. 1a-5a. That decision affirmed an award of punitive damages made after a second trial specifically limited to that issue. The pertinent rulings and judgment of the United States District Court for the District of South Carolina, after the second trial, are unreported and reprinted at Pet. App. 6a-37a. The district court's decision after the first trial is reported at 727 F. Supp. 252 and reprinted at Pet. App. 38a-53a. The decision of the Fourth Circuit remanding the case for the second trial is reported at 938 F.2d 502, and reprinted at Pet. App. 54a-66a.

JURISDICTION

The Court of Appeals issued its decision on March 11, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in pertinent part: "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . ."

The Seventh Amendment to the U.S. Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

STATEMENT

Petitioner Northwestern Mutual Life Insurance Company seeks review of a decision of the United States Court of Appeals for the Fourth Circuit affirming an award of punitive damages totalling $5 million.[1] In this diversity case, a jury found that a Northwestern agent in South Carolina had made a fraudulent promise in the course of selling a life-insurance policy. The court of appeals approved a $5 million penalty for this tort, even though the tort was an isolated occurrence, the compensatory damages totalled less than $107,000, and the latter figure represents the most generous possible estimate of the injury that petitioner *could* have inflicted through this tort. In so ruling, the court applied lenient federal standards for review of jury verdicts, rather than using the structured, independent form of review that was

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[1] Other parties not listed in the caption are co-plaintiffs Kathryn Inabinet Vickery and the Kathryn Inabinet Vickery Marital Trust. The Northwestern Mutual Life Insurance Co. is a mutual insurance company with no parent. It has a partial interest, either directly or through a wholly owned subsidiary, in four subsidiaries: American Lantern Co., Baird Financial Corp., Grand Avenue Corp., and Kane McKenna, Inc.

adopted by the South Carolina Supreme Court in response to *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991). Petitioner submits that this approach constituted a denial of procedural due process and led to affirmance of a punitive damage award that, by any reasonable standard, is grossly excessive.

1. *Underlying Facts.* This case arose out of the purchase by respondent Defender Industries, Inc., of an $8 million Northwestern insurance policy on the life of its main shareholder, respondent Kathryn Inabinet Vickery. Viewed most favorably to respondents, the evidence showed that Defender was hesitant about purchasing the policy and was induced to do so by a fraudulent representation from a Northwestern agent, who told Defender that it could subsequently reduce the coverage and receive a corresponding partial refund of premiums going back to the original purchase date. Pet. App. 39a-40a. Nine months later, during which time the full policy had been in effect, Defender asked for a reduction in coverage from $8 million to $7 million and for a refund of approximately $13,000 in premiums. Petitioner agreed to reduce the coverage (and future premiums), but refused to pay the requested refund. *Id.* at 40a, 48a.[2]

Defender thereupon wrote to Northwestern's chief executive, seeking a compiete rescission of the policy. Ct. App. J.A. 816-18. This complaint was supportd by a letter from a second Northwestern agent who stated that he was present at the meeting where Defender received the improper rebate promise. *Id.* at 819-22.[3] A senior Northwestern executive conducted an investigation and wrote back to Defender stating that he had found no rea-

[2] There was also evidence presented that, prior to the request for a reduction in coverage, the agent who had sold the policy threatened Defender with the loss of one of its largest customers if the policy was reduced or cancelled. Pet. App. 7a, 34a-35a.

[3] This second agent left Northwestern at about this time, and soon thereafter received a substantial commission from selling Defender a replacement insurance policy. Ct. App. J.A. 325.

son to rescind the policy or to discipline any agent. *Id.* at 826-29.[4]

2. *Proceedings Below.* In the initial trial, based on these facts, a jury in the U.S. District Court for South Carolina returned a verdict for respondents on state-law fraud claims. It awarded compensatory damages of $106,513.74 (the entire amount of premiums paid on the policy) and punitive damages of $5 million. The district court (Henderson, J.) entered a partial judgment n.o.v., reducing the punitive damages to $10,000. The court reasoned that the award of $5 million, "almost 50 times greater than the actual damages award, is so grossly inflated as to constitute a miscarriage of justice." Pet. App. 50a. The court added that there was "no evidence presented that the agents' actions constitute Northwestern's business practice or that Northwestern knew of or condoned fraudulent practices by its agents." *Ibid.* Instead, this "case appears to be an isolated incident created by overzealous agents which is not likely to be repeated." *Ibid.*[5]

On appeal, the Fourth Circuit held that it was improper for the district court to have reduced the punitive damages to a sum certain instead of giving respondents the choice between accepting a remittitur or a new trial. Pet. App. 58a-63a.[6] The court then ruled that the district court had acted within its discretion in ordering, in

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[4] The courts below found that this evidence allowed the conclusion that senior management at Northwestern became aware of the original misconduct and tried to conceal it. Pet. App. 28a, 57a.

[5] The court also emphasized the relative sophistication of Defender's officers as an additional reason for denying that company a sizable "punitive damages windfall." Pet. App. 51a.

[6] The Fourth Circuit heard the case *en banc*, ultimately overruling a prior decision, *Shamblin's Ready Mix, Inc. v. Eaton Corp.*, 873 F.2d 736 (4th Cir. 1989), which had authorized the district courts simply to reduce punitive damage awards, rather than using a remittitur procedure.

the alternative, a new trial on the issue of punitive damages, and it remanded the case for that purpose. *Id.* at 63a-64a.

By the time the case was ready to be retried, several key legal developments had occurred. This Court had issued its decision in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991), holding that the Alabama system of awarding punitive damages satisfied the requirements of procedural due process. The Supreme Court of South Carolina, in turn, had adopted a similar system, which requires trial judges to conduct post-verdict hearings where they independently review jury awards of punitive damages, applying eight proportionality factors not specifically considered by the jury. *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350, 354 (1991).[7] Finally, in response to *Gamble*, the Fourth Circuit had held that the Seventh Amendment barred the use of this new procedure in South Carolina diversity cases tried in federal court. *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 107-10 (4th Cir. 1991). Instead, the Fourth Circuit established a new hybrid procedure, applicable only in diversity cases, under which the jury is given instructions loosely based on the *Gamble* factors and the jury's verdict is then reviewed under the usual federal standard for granting a new trial—*i.e.*, whether the verdict is against the clear weight of the evidence. *Ibid.*[8]

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[7] These factors are: "(1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) as noted in *Haslip*, 'other factors' deemed appropriate." *Gamble*, 406 S.E.2d at 354.

[8] The jury instructions mandated by *Mattison*, were phrased as follows:

> (1) *Relationship to harm caused*: Any penalty imposed should take into account the reprehensibility of the conduct, the harm

Mattison therefore controlled the proceedings in the retrial of the punitive damages issue in this case. At that trial, which was conducted before a different district judge, the parties presented essentially the same evidence. Pet. App. 8a.[9] As before, the jury was allowed to hear evidence (over petitioner's objection) that Northwestern is an extremely large and successful insurance company, with assets, a net worth, and annual income in the billions of dollars. *See* Pet. App. 28a. This factor was also heav-

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caused, the defendant's awareness of the conduct's wrongfulness, the duration of the conduct, and any concealment. Thus any penalty imposed should bear a relationship to the nature and extent of the conduct and the harm caused, including the compensatory damage award made by the jury.

(2) *Other penalties for the conduct*: Any penalty imposed should take into account as a mitigating factor any other penalty that may have been imposed or which may be imposed for the conduct involved, including any criminal or civil penalty or any other punitive damages award arising out of the same conduct.

(3) *Improper profits and plaintiff's costs*: The amount of any penalty may focus on depriving the defendant of profits derived from the improper conduct and on awarding the costs to the plaintiff of prosecuting the claim.

(4) *Limitation based on ability to pay*: Any penalty must be limited to punishment and thus may not effect economic bankruptcy. To this end, the ability of the defendant to pay any punitive award entered should be considered.

947 F.2d at 110.

[9] The district court's opinion states that three new facts were shown at the second trial: (1) that the agents involved in the tort had not been disciplined, (2) that the refund promise was illegal under South Carolina law, and (3) that the South Carolina insurance regulators had not imposed any sanction for the conduct at issue. Pet. App. 32a. With respect to the first point, petitioner explained to the jury that discipline of the only agent who remained with Northwestern had been delayed on advice of counsel because of the pending legal proceedings. With respect to the third point, the court was simply incorrect: the trial record in fact is devoid of any discussion of whether and how the state insurance regulators responded to the improper refund promise.

ily emphasized in respondents' closing argument.[10] And the jury was instructed (again over an objection) that it could consider the defendant's "ability to pay" in its calculation of a punitive award.[11] The jury returned a verdict of *$25 million* in punitive damages, five times greater than the amount returned by the first jury and 2500 times greater than the amount approved by the first judge.

After the second trial, the district court denied petitioner's motion for a new trial, but also ruled that a new trial would be ordered if respondent did not agree to remit the amount of the verdict in excess of $5 million. The court selected this figure as the "most that a reasonable jury could award by way of punitive damages in this case," taking into account the *Mattison* factors that the jury had been instructed to apply. *Id.* at 31a. The court emphasized that two juries had concluded that the penalty should be at least $5 million. *Id.* at 32a. Respondents accepted the remittitur.

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[10] Counsel for respondents argued, *inter alia*:

> They make money hand over fist. That is one of the things they promote in the sales of their policies. We have $35 billion dollars in assets. . . . If you take one percent of that number it is $357 million. . . . You take 1/10 of one percent, and as I said it is $35,743,000. . . . Now, you heard me talk to or you heard the testimony about the net investment income per day. . . . This company made $2.6 billion in 1991 on net investment income. . . . That amount per day is $6,950,000. . . . I would also suggest to you what you might want to do or consider is punishing them for the number of days we have been in this courtroom trying this case. By the amount they make per day.

Tr., Vol. IV, at 48-51.

[11] As noted above (note 8, *supra*), the Fourth Circuit in *Mattison*, drawing on the South Carolina post-trial review factors, had listed four considerations to be set out in jury instructions, including the factor of "limitation based on ability to pay." 947 F.2d at 110. The district court here expanded this factor to encompass the opposite—*i.e.*, the existence of a "deep pocket" as a consideration justifying an *increase* in the damages award. The Fourth Circuit subsequently rejected petitioner's claim that the district court had misread *Mattison*.

Petitioner appealed, arguing that $5 million in punitive damages in this case remained (to use Judge Henderson's words after the first trial) "so grossly inflated as to constitute a miscarriage of justice" in violation of the Due Process Clause. In particular, petitioner argued (1) that it was inappropriate to instruct the jury to consider Northwestern's wealth, (2) that a rule-of-thumb ratio between actual (or potential) damages and permissible punitive damages should be adopted, and (3) that the jury instructions followed by deferential review of the jury's verdict did not provide adequate procedural protections in this case. The Fourth Circuit affirmed in an unpublished *per curiam* decision. Without specifically addressing petitioner's arguments, the court held that the district court's "determination of the appropriate amount of the nisi verdict was not an abuse of discretion or a denial of due process." Pet. App. 5a. In so ruling, the Fourth Circuit adopted "the reasoning of the district court." *Ibid.*

REASONS FOR GRANTING THE WRIT

This petition presents an important question that has arisen as state courts have begun to conduct structured and independent reviews of jury awards of punitive damages, using standards and procedures comparable to those approved by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991). That question is whether such independent reviews of jury verdicts can, or indeed must, be conducted in federal court in diversity cases. The Fourth Circuit has taken the position that the Seventh Amendment prevents a federal court from adopting any procedure for review of punitive damage awards that allows the court to exercise independent judgment or consider evidence or legal standards not previously presented to the jury. *Mattison v. Dallas Carrier Corp.*, 947 F.2d at 107-10. This Court has strongly suggested, however, that some such review procedure is a due process requirement, *Haslip*, 111 S. Ct. at 1044-45, and other circuits have perceived no barrier to following state post-

verdict review procedures in diversity cases. The Fourth Circuit's contrary view rests on a dubious interpretation of the Seventh Amendment and is likely to lead to substantial forum shopping in that Circuit as plaintiffs come to recognize the benefits of bringing their cases in federal court. Petitioner asks the Court to grant review here in order to resolve both this actual conflict among the circuits and the perceived conflict between two constitutional guarantees—the right to a jury trial and the right to due process.

The result of following the Fourth Circuit's approach in this case was affirmance of a $5 million judgment that constitutes a glaring example of the due process problems that this Court recognized and sought to address in *Haslip* itself. This, after all, is a case where the defendant was accused of a purely commercial tort that caused, at most, an actual loss of $107,000, and where the first judge concluded that the appropriate level of punitive damages was one five-hundredth the amount that the second judge approved. It is also a case where there can be no argument that a massive penalty is justified either because of some larger *potential* harm or gain associated with the tort, because of a pattern of similar misconduct, or because of any possibility that the tort might have gone undetected. On these facts, there was only one reason why the jury came up with a multi-million-dollar verdict: it was instructed to devise an appropriate penalty reflecting (among other things) the "ability to pay" of a company with $35 billion in assets.

This massive and unprincipled award cannot stand if there are *any* substantive due process limits on punitive damages. A similar claim is currently before the Court in No. 92-479, *TXO Prod. Corp. v. Alliance Resource Corp.* Consequently, even if the Court were to decide that this case does not warrant plenary consideration at this time, the petition should be held pending the decision in *TXO*.

I. THIS CASE PRESENTS AN IMPORTANT QUESTION, AS TO WHICH THE CIRCUITS ARE IN CONFLICT, REGARDING THE INTERPLAY BETWEEN DUE PROCESS AND SEVENTH AMENDMENT RIGHTS WHEN FEDERAL COURTS ARE CALLED UPON TO REVIEW JURY AWARDS OF PUNITIVE DAMAGES.

The heart of this Court's decision in *Haslip* is the recognition that "unlimited jury discretion . . . in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." 111 S. Ct. at 1043. The Court there reviewed the Alabama standards and procedures for assessing punitive damages, asking whether they "impose[d] a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages." *Id.* at 1045. In upholding the Alabama approach, the Court placed primary reliance on the "Alabama Supreme Court's post-verdict review [which] ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." *Ibid.*

The South Carolina Supreme Court heeded the message of *Haslip*, soon creating its own very similar system for independent judicial review of punitive damage awards. Under that system, the jury is simply told to select a penalty that will punish and deter and that reflects the defendant's ability to pay. The trial court, however, considers other factors and evidence relevant to those factors. *Gamble v. Stevenson*, 406 S.E.2d at 354. *See* note 7 *supra* (listing the eight *Gamble* factors). That process was specifically designed to enhance the predictability and fundamental fairness of the process for awarding punitive damages. But, because this case was tried in federal court, the Fourth Circuit's constitutional analysis in *Mattison* prevented these safeguards from being applied.

In *Mattison*, the court canvassed the history of review of jury verdicts at common law and concluded that the

Seventh Amendment "reserves the weighing of evidence and the finding of facts exclusively to the jury." 947 F.2d at 108. While acknowledging that jury verdicts may be overturned when they are either based on improper factors or against the clear weight of the evidence, the court held that judges may not "consistent with the Seventh Amendment, evaluate a jury's verdict based on evidence that the jury was not permitted to consider at trial or on a legal standard not given to the jury." *Ibid.* The court thus concluded that a "*Haslip*-type post-trial review, insofar as it is a *quasi* de novo review by which the court reviews facts, some of which may not have been presented to the jury, would be inconsistent with the restrictions of the Seventh Amendment." *Ibid.*

The Fourth Circuit in *Mattison* also held, however, that it would violate due process to award punitive damages in federal court using the traditional South Carolina jury instruction, followed by the usual deferential review of the jury's determination. *Id.* at 101-06. In the court's view, the instruction provided insufficient guidance, because it permitted the jury "to assess any amount that it feels appropriate to punish or to deter, without any meaningful standard or limitation." *Id.* at 105. And post-trial review pursuant to federal standards would not solve this problem, because "[w]hen no meaningful State law standard or limit is given to the jury on the amount of punitive damages to be awarded, it can hardly be urged that the jury acted beyond the evidence or not in compliance with the court's instructions." *Id.* at 106. The Fourth Circuit's purported solution to this problem was to reduce most, but not all, of the eight *Gamble* post-verdict review factors into four criteria to be included in the jury instructions and then to review the jury's application of those factors under the deferential standards of Fed. R. Civ. P. 50 and 59. *See Mattison*, 947 F.2d at 107-10; note 8 *supra*. *See also Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1414-18 (4th Cir. 1992) (*en banc*) (taking

the same approach in a diversity case arising under Virginia law).

For several reasons, the Fourth Circuit's approach to this issue merits review by this Court. First, it conflicts with decisions from the Fifth and Eleventh Circuits, which have mandated that diversity cases involving punitive damages should be tried and reviewed just as they would have been in state court. Thus, in *American Employers Ins. Co. v. Southern Seeding Servs., Inc.*, 931 F.2d 1453, 1457-58 (11th Cir. 1991), a diversity case arising under Alabama law, the court endorsed the jury instruction given by the district court, which, as in *Haslip*, was a traditional common-law instruction. But the Eleventh Circuit then held that the district court should have followed the Alabama post-trial review system—making on-the-record findings addressing eight specific factors not set out in the jury instructions. *Id.* at 1458. *See also Braswell v. Conagra, Inc.*, 936 F.2d 1169, 1176 (11th Cir. 1991) (approving district court's review using the Alabama factors, after a jury instruction that did not incorporate those factors).

Similarly, in *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1095-99 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1778 (1992), a Texas diversity case, the Fifth Circuit itself assessed the punitive award using five factors specified under Texas law and not included in the jury instructions. The court then went on to determine whether the Texas system for awarding punitive damages comports with procedural due process, without ever intimating that this process would operate differently in federal court in light of the Seventh Amendment. These decisions are irreconcilable with the Fourth Circuit's approach, which combines a substantial revision of the jury instructions that would be given in state court with a refusal to follow state post-verdict review standards and procedures.

The Fourth Circuit's approach also appears to be wrong. To begin with, it is premised on the proposition that the Seventh Amendment mandates that juries have control over the *amount* of punitive damages to be awarded in civil cases. In *Tull v. United States*, 481 U.S. 412 (1987), however, this Court suggested the opposite conclusion. The Court there held that the Seventh Amendment required a jury trial to determine *liability* in suits seeking civil penalties under the Clean Water Act, reasoning that such penalties were "legal" remedies equivalent to "punitive damages." *Id.* at 422-25. But it went on to hold that the Seventh Amendment did not require the jury to play a role in determining the *amount* of the penalty to be imposed after a finding of liability. *Id.* at 425-27. The Court explained that assessment of the penalty does not "involve the substance of a common-law right to a trial by jury, nor a fundamental element of a jury trial." *Id.* at 426 (internal quotations omitted). It would seem to follow that the Amendment is not implicated by any post-verdict review procedure that merely affects the amount of punitive damages awarded in a civil case in federal court. *But see* Pet. App. 60a (the Fourth Circuit, in the first appeal in this case, rejected application of *Tull* to common-law punitive damages).

Moreover, the Fourth Circuit's approach does not effectively address the due process concerns at issue in *Haslip*. Indeed, the Fourth Circuit itself recognized that the traditional common-law system for awarding punitive damages—typically a cursory instruction outlining the punitive and deterrent purposes of such damages, followed by a highly deferential judicial review—does not pass constitutional muster under the due process clause. *See Mattison*, 947 F.2d at 101-06. Yet, the court adopted a solution that does almost nothing to promote procedural fairness. In essence, the Fourth Circuit has said that any due process concerns about the traditional common-law system can be resolved simply by giving the

jury more (unrelated and unweighted) factors to consider in setting the penalty. The difficulty with this solution, of course, is that giving such factors to a jury is not remotely the same as asking a judge to apply them in an independent review of a prior jury verdict. For this reason, there is no equivalence, as a matter of due process, between the South Carolina post-trial review system modelled on *Haslip* and the procedures applied here in this diversity case.

To see why this is so, one need only look at the four factors provided to the jury in this case as prescribed by *Mattison*. Specifically, the jury was told to consider: "Relationship to the harm caused," "Other penalties [imposed on the defendant] for the conduct," "Improper profits, if any," and "Ability to pay." Ct. App. J.A. 707-08. The obvious problem with such instructions is that the fourth factor effectively undermines whatever actual guidance is given by the first three: the jury is left completely at sea when it is told to relate its verdict *both* to the facts of a particular case and to the wealth of a $35 billion company. In short, as the district court acknowledged, "[t]his case dramatically demonstrates the inherent tension that exists among the various factors to be addressed in assessing punitive damages." Pet. App. 30a. In light of that tension, it cannot be concluded that the jury instruction mandated by *Mattison* and given in this case does any more to promote predictability than the uncabined instructions reviewed in *Haslip*.[12]

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[12] As Judge Hamilton pointed out in dissent in *Johnson v. Hugo's Skateway*, *supra*, the present case provides compelling evidence that the "new federal instructions [mandated in *Mattison*] do not guarantee any greater uniformity of result." 974 F.2d at 1448. After all, it was only at the retrial that the *Mattison* instructions were substituted for the traditional South Carolina instructions, and the jury then proceeded to award *five times* as much as the first jury had awarded.

A judge independently applying the same factors under the South Carolina review system, by contrast, would be meaningfully constrained. He or she would be required to make appropriate findings and to "explain the conditions that require a particular award of punitive damages." *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1385 (5th Cir. 1991) (upholding application of Mississippi factors for assessment of punitive damages in part because the fact-finder was a judge). In contrast to juries, moreover, judges have knowledge of the damages verdicts rendered in a long series of cases. They therefore can develop rules of thumb that apply from case to case and help to create predictability and consistency in the imposition of punitive awards.

It is no answer to say that, under the Fourth Circuit's approach, jury verdicts do receive post-trial review at the trial and appellate levels. That review, when conducted, as here, on the basis of the federal new-trial standard, does little to cure the problem created by the jury instructions. The court simply asks whether a rational jury could have reached its verdict, taking into account the evidence and standards given to it. Pet. App. 30a-31a. And the federal appellate standard asks only the extremely relaxed question whether the district court abused *its* discretion in ruling on a new-trial motion.[13]

Finally, this Court should consider the practical consequences of the Fourth Circuit's approach with respect to the administration of justice. A plaintiff seeking to sue a large company for damages in South Carolina now has a choice between (1) a federal court where the jury will

[13] In this case, this appellate standard was applied to justify two opposite conclusions. On the first appeal, the court ruled that it was within the district court's discretion to order a new trial based on the sheer magnitude of a $5 million punitive verdict. But on the second appeal, the same court ruled that it was not an abuse of discretion to select $5 million as an amount that a jury *could* rationally impose.

be given a list of factors to consider (including the defendant's ability to pay) and subsequent review will be deferential, and (2) a state court where the jury may receive less guidance but the trial and appellate courts will consider additional evidence and exercise structured, independent review powers. It is not hard to predict which forum will be chosen.[14]

II. THE AWARD OF PUNITIVE DAMAGES IN THIS CASE IS SO EXCESSIVE THAT IT SHOULD BE REVERSED ON THAT BASIS ALONE.

This Court recognized in *Haslip* that, at some point, the sheer magnitude of an award of punitive damages, in relation to the conduct and injury at issue, will constitute a deprivation of due process of law. *See Haslip*, 111 S. Ct. at 1043 (citing *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909)); *id.* at 1045 ("post-verdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to [the] compensatory damages"); *id.* at 1046 (punitive damages of four times compensatory damages "may be close to the [constitutional] line"). The Court further emphasized that the determina-

[14] It is unclear whether, even leaving aside due process concerns, it is appropriate as an *Erie* matter for a federal court to disregard a state post-verdict review procedure in a diversity case. *See generally Byrd v. Blue Ridge Rural Elec. Co.*, 356 U.S. 525 (1958). This Court in *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989), held that state law provides the relevant substantive standards while federal law "will control on those issues involving the proper review of the jury award by a federal district court and court of appeals." *But cf. American Employers Ins. Co. v. Southern Seeding Servs., Inc.*, 931 F.2d at 1458 (finding *Browning-Ferris* to be consistent with post-trial application of state-law review factors that were not given to the jury). *See also, e.g., Yeldell v. Tutt*, 913 F.2d 533, 539-40 (8th Cir. 1990) (reviewing award of punitive damages using *state* sufficiency-of-evidence standard in a diversity case). We note also in this regard that no due process claim was considered in *Browning-Ferris*. *See* 492 U.S. at 276-77.

tion of the amount of the punitive damages must be based on "more than the defendant's net worth," and that plaintiffs should not "enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." 111 S. Ct. at 1045. If these constitutional principles have any real meaning, they must have been violated by the $5 million judgment at issue here—a judgment that can be explained *only* by reference to the "deep pocket" of the Northwestern Mutual Life Insurance Company. The Fourth Circuit's decision to affirm that judgment not only further illustrates the flaws in that court's hybrid *"Mattison"* procedures, but also provides an independent reason for review by this Court.

By any reasonable measure, a penalty of $5 million for the conduct at issue here is excessive. That conduct involved a single improper promise by an insurance agent to refund part of the premium paid for an insurance policy. The courts below suggested that the evidence permitted the conclusion that the Northwestern home office learned about this improper conduct after the fact and failed to respond appropriately. Pet. App. 28a, 57a. While petitioner disputed that conclusion, even if it were supportable there would still be no dispute that the improper conduct in this case was an "isolated incident" and that Northwestern routinely takes steps to *prevent* such misconduct by its agents. Pet. App. 29a, 50a. It was for these reasons that the first district judge to hear the case rejected a punitive verdict of $5 million as a "gross miscarriage of justice" and reduced it to $10,000. *Id.* at 50a, 53a.

Even if reasonable people might disagree about the selection of the latter figure as an appropriate maximum penalty, one thing is clear: this cannot have been the most "heinous" tort committed in South Carolina in recent memory. Yet the punitive damage award of $5 million is larger than *any* award of punitive damages in a South Carolina case that has ever been affirmed on appeal in state or federal court. Moreover, in those few cases where

previous awards have approached or exceeded a million dollars, the actual injury inflicted was closely related to the amount of the penalty imposed.[15] Here, by contrast, the punitive damages awarded were 47 times the compensatory damages, which themselves represented the most generous possible evaluation of the actual injury suffered by respondents.[16] In *Haslip*, this Court stated that a 4:1 ratio of punitive to actual damages "may be close to the [constitutional] line." 111 S. Ct. at 1046. If that line really exists, it surely has been crossed here.

It is also clear why this occurred. This is not a case where a substantial disparity between compensatory and punitive damages was even arguably justified by a larger *potential* harm that the defendant might have inflicted

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[15] In state court, the largest affirmed punitive award appears to have been $1,125,000 awarded in *Scott v. Fruehauf Corp.*, 302 S.C. 364, 396 S.E.2d 354 (1990), where the actual damages equalled the punitive damages. The next two largest affirmed state verdicts totalled $300,000, *Wilkes v. Moses*, 291 S.C. 504, 354 S.E.2d 403 (Ct. App. 1987) (punitive damages were less than one-half of actual damages), and $150,000, *Durham v. Clements*, 295 S.C. 90, 367 S.E.2d 174 (Ct. App. 1988) (punitive damages were three times actuals). All of these cases involved the infliction of severe personal injuries.

In federal court the largest affirmed punitive award appears to have been $2.5 million. *Faircloth v. Finesod*, 938 F.2d 513 (4th Cir. 1991) (punitives were five times actuals; defendant defaulted at trial and then appealed). *See also City of Greenville v. W.R. Grace & Co.*, 827 F.2d 975 (4th Cir. 1987) ($2 million punitive award, less than one-third of actuals); *Campus Sweater & Sportswear Co. v. M.B. Kahn Constr. Co.*, 515 F. Supp. 64 (D.S.C. 1979), *aff'd mem.*, 644 F.2d 877 (4th Cir. 1981) ($500,000 in punitives, less than three times actuals).

[16] The $106,513.74 in compensatory damages awarded at the first trial constituted all of the premiums paid for the insurance policy—even though the policy was in force for a considerable period of time and even though Defender did not initially even seek more than a *reduction* in the coverage and premiums. The amount of the premium actually at issue was approximately $13,000. Using that figure, the $5 million punitive-damages verdict was 384 times greater than the value of the actual injury inflicted.

through the tort.[17] Nor was this a tort that was difficult to detect (since it involved a direct promise openly breached) or was part of some broader pattern of misconduct—thus arguably justifying greater deterrent penalties.

The key in this case was that, unlike in *Haslip* (*see id.* at 1044), the jury instructions and plaintiffs' counsel encouraged the jury to base its award on petitioner's size and wealth. *See* pp. 6-7 *supra*. The result was to allow Defender to "enjoy a windfall" because it had sued a company with billions of dollars of income and assets. Indeed, the district court itself acknowledged this fact. During oral argument on the motion for a new trial, when counsel for petitioner argued that it had been a mistake to tell the jury that Northwestern is a $35 billion company, the court responded:

> It's certainly a *textbook situation* for testing this issue . . . because as Judge Henderson pointed out on the—on the type of conduct involved, it's not a typical personal injury case where you have horrible brain damage, quadriplegic, emotional scarring, and all of that sort of thing, it was a busines dispute. *And I certainly agree with you that the net worth of the defendant probably did play a major part—a major role in the verdict.*[18]

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[17] Petitioner's potential *gain* from the sale of the policy is more difficult to estimate exactly, since it depends on assumptions about how long the policy might have remained in force and how long the insured might have lived—factors unknown, of course, at the time the policy was sold. Clearly, however, any potential net gain associated with a single policy of this magnitude (constituting some fraction of gross annual premiums of approximately $100,000) is dwarfed by comparison with $5 million in punitive damages.

[18] Ct. App. J.A. 724-25 (emphasis added). Although the district court ultimately reduced the second verdict from $25 million to $5 million, it nevertheless selected the latter figure as the maximum amount that a reasonable jury could award, taking into account Northwestern's "ability . . . to pay." Pet. App. 31a. Thus, the court adhered to its position that the wealth of the defendant was a legitimate, potentially primary basis on which to set the amount of punitive damages in this kind of case.

In light of the clarity of this record, the second question presented here—involving the size of the penalty imposed and its relation to the constitutionally relevant factors—would be independently worthy of review even if it were not so closely linked to the important procedural issues set forth in petitioner's first question presented. This Court's decision in *Haslip*, while suggesting that a case like this one would be constitutionally problematic, did not attempt to specify the outer constitutional limits of punitive damages. The scope of those limits may, of course, be clarified in the pending *TXO Production Corp.* case, where another large company claims that it was unfairly forced to pay millions of dollars as a penalty for a relatively insignificant tort. For that reason, this petition should at minimum be held pending the decision in *TXO*. But, because of the significance of the first issue presented here (which is not raised in *TXO*), as well as the glaring nature of the excessiveness problem in this case, petitioner submits that the better course of action would be for the Court to grant review in this case now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-1656

DEFENDER INDUSTRIES, INCORPORATED;
KATHRYN C. INABINET VICKERY;
KATHRYN C. INABINET VICKERY MARITAL TRUST,
Plaintiffs-Appellees,

v.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
Defendant-Appellant.

Appeal from the United States District Court
for the District of South Carolina, at Columbia.
Joseph F. Anderson, Jr., District Judge.
(CA-88-3231-3-17)

Argued: February 1, 1993

Decided: March 11, 1993

Before WILKINS and LUTTIG, Circuit Judges, and
WILLIAMS, Senior United States District Judge for the
Eastern District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

OPINION

PER CURIAM:

Once again the question before us is the propriety of the amount of punitive damages assessed against Northwestern Mutual Life Insurance Company in this litigation. We previously remanded this case for retrial on the issue of the amount of punitive damages. *See Defender Indus., Inc. v. Northwestern Mut. Life Ins. Co.*, 938 F.2d 502 (4th Cir. 1991) (en banc). At the conclusion of the second trial, the jury returned a verdict five times larger than the one awarded in the first trial. The district court ordered another new trial on this issue, provided that Defender [1] did not agree to remit all of the verdict in excess of $5,000,000. Defender assented to the remittitur, and Northwestern appeals the nisi punitive damages verdict established by the district court. We affirm.

I.

The facts underlying the dispute between these parties are set forth in detail in the prior opinion of the en banc court. *Id.* at 503-04. The first jury to hear this case awarded $106,513.74 in actual damages and $5,000,000 in punitive damages based on Defender's fraud causes of action. *Id.* at 504. On post-trial motions, the district judge determined that some amount of punitive damages was justified by the evidence, but that the amount awarded by the jury was, in her opinion, excessive. *Id.* at 505. Rather than grant a new trial nisi remittitur, relying on then existing precedent of this circuit, *Shamblin's Ready Mix, Inc. v. Eaton Corp.*, 873 F.2d 736, 743 (4th Cir. 1989), *overruled by Defender Indus., Inc. v. Northwestern Mut. Life Ins. Co.*, 938 F.2d 502 (4th Cir. 1991)

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[1] For ease of reference this opinion refers to Plaintiffs—Defender Industries, Incorporated; Kathryn C. Inabinet Vickery; and the Kathyrn C. Inabinet Vickery Marital Trust—collectively as "Defender."

(en banc), the district judge granted judgment notwithstanding the verdict and set the amount of punitive damages at $10,000. *Defender*, 938 F.2d at 505. Alternatively, she conditionally granted a new trial. *Id.* at 507.

This court affirmed in part, finding that the district judge's rulings with respect to actual damages and liability for punitive damages were proper. *Id.* at 505, 508-09. We reversed the grant of judgment notwithstanding the verdict with respect to the amount of punitive damages, overruling *Shamblin's Ready Mix* on the basis that the Seventh Amendment required that a jury determine the amount of a punitive damages verdict. *Id.* at 507. However, because the district judge did not abuse her discretion in granting a new trial on the issue of the amount of punitive damages, we remanded for a new trial on this issue. *Id.* at 507-09.

On remand the case was assigned to a different district judge. Before the case could be retried, this court decided *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991), which held that the South Carolina scheme for awarding punitive damages as applied by federal courts sitting in diversity judisdiction had violated due process. Consequently, the district judge, who was assigned to retry this case on remand, conducted the new trial on the issue of the amount of punitive damages utilizing the procedures outlined in *Mattison*. The jury returned a verdict of $25,000,000 in favor of Defender.

The district judge ruled that this verdict was excessive and grossly disproportionate to the severity of the offense and ordered a new trial unless Defender agreed to remit all but $5,000,000 of the punitive damages verdict—the greatest amount of punitive damages the district judge concluded a reasonable jury could have awarded. Defender accepted the remittitur.

Northwestern appeals, arguing that the district judge erred in assessing the amount of the nisi punitive damages

award in contravention of the law of South Carolina, as established in *Mattison*, by considering Northwestern's ability to pay other than as a limitation on the amount of punitive damages that could properly be awarded. Additionally, Northwestern claims that the amount of the nisi punitive damages award, which is approximately 47 times the amount of actual damages awarded, in addition to being grossly disproportionate to the conduct for which punitive damages were awarded, violates principles of due process.

II.

As the Supreme Court has stated:

> In reviewing an award of punitive damages, the role of the District Court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under [Federal Rule of Civil Procedure] 59, whether a new trial or remittitur should be ordered. The Court of Appeals should then review the District Court's determination under an abuse-of-discretion standard.

Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 279 (1989). Under Rule 59, a district court may set aside an excessive damages award if it determines " 'that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice.' " *Defender*, 938 F.2d at 507 (*quoting Johnson v. Parrish*, 827 F.2d 988, 991 (4th Cir. 1987)). We review the decision of the district court that the nisi verdict is not excessive for an abuse of discretion. *See Browning-Ferris*, 492 U.S. at 279; *see generally* 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2820, at 135-36 (1973).

In assessing the appropriate amount of the nisi verdict the district court carefully addressed the factors the jury

was to consider in awarding punitive damages and analyzed the evidence presented in a thorough, well-reasoned opinion. We find that the district court properly decided the legal issues and that its determination of the appropriate amount of the nisi verdict was not an abuse of discretion or a denial of due process. Accordingly, we affirm on the reasoning of the district court.[2]

AFFIRMED

[2] Northwestern requested that, in the event we ordered a remand of the case for retrial, we address several allegedly erroneous evidentiary rulings by the district court in order to avoid error on remand. In light of our affirmance, we need not address these issues.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

C/A No.: 3:88-3231-17

DEFENDER INDUSTRIES, INC.,
KATHRYN INABINET VICKERY, and the
KATHRYN INABINET VICKERY MARITAL TRUST,
Plaintiff,

v.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
Defendant.

[Filed April 29, 1992]

This action is before the court upon motion of the defendant, Northwestern Mutual Life Insurance Company (Northwestern), for a new trial. Also before the court is the issue, raised by the court *sua sponte*, of whether the court should instead order a new trial *nisi* remittitur. For the reasons set forth below, the motion for a new trial outright is denied. However, the court will order a new trial *nisi* remittitur.

This action was initially tried by The Honorable Karen Henderson, United States District Judge, in September 1989. The jury returned a verdict for the plaintiff, Defender Industries, Inc. (Defender),[1] for actual and con-

[1] The party plaintiffs in the present action include Defender Industries, Inc., Kathryn Inabinet Vickery, and the Kathryn Inabinet

structive fraud. The fraud verdict was based upon evidence indicating that Northwestern fraudulently promised a partial premium refund on an $8 million life insurance policy that Defender purchased. The evidence also disclosed that when Defender sought to assert its rights under the promise, Northwestern threatened to cause Defender's largest customer to take its business elsewhere. The jury awarded actual damages in the amount of $106,513.74 and punitive damages in the amount of $5 million. Relying upon the authority granted to the district court in *Shamblin's Ready Mix, Inc. v. Eaton Corp.*, 873 F.2d 736 (4th Cir. 1989), Judge Henderson reduced the punitive award to $10,000. *Defender Indus., Inc. v. Northwestern Mut. Life Ins. Co.*, 727 F. Supp. 252 (D.S.C. 1989). On appeal, the United States Court of Appeals for the Fourth Circuit, sitting *en banc*, reversed the *Shamblin's* precedent and held that the Seventh Amendment prevents a district court from ordering a punitive damage verdict reduced to a sum certain upon a finding that the damage award was excessive. *Defender Indus., Inc., v. Northwestern Mut. Life Ins. Co.*, 938 F.2d 502 (4th Cir. 1991) (en banc). Because of this, the court reversed Judge Henderson's decision to set the punitive award at $10,000. Judge Henderson had alternatively found that the punitive damage verdict returned by the jury was so excessive as to warrant a new trial on the amount of the punitive award. The Fourth Circuit determined that the alternative disposition formulated by Judge Henderson was not an abuse of discretion. The case was thus remanded to this court for a new trial limited solely to the amount of the punitive award. In a footnote, the Fourth Circuit suggested that the court might wish to consider the appropriateness of granting a new trial *nisi* remittitur. 938 F.2d at 507 n.1.

Vickery Marital Trust. *See infra* at p. 11. References throughout this opinion to Defender shall include the other party plaintiffs as well.

Judge Henderson was thereafter appointed to the United States Court of Appeals for the District of Columbia, and this case was transferred to the undersigned for resolution. When the file was received from the Fourth Circuit, this court held a status conference with the attorneys to discuss the feasibility or desirability of this court reviewing the entire transcript and ordering a new trial *nisi* remittitur. Initially, the court was inclined to attempt such a procedure. Before this could be done, however, the United States Court of Appeals for the Fourth Circuit decided *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991). The *Mattison* decision significantly altered the law of punitive damages in South Carolina. Because the legal landscape had thus changed in the interim, this court determined that a new trial was appropriate.

The action was retried February 4-7, 1992. Although the new trial was limited to the question of the amount of the punitive award, what in essence occurred was, with two exceptions noted below, a virtual retrial of the original action. Unlike a retrial involving an award of compensatory damages, a retrial of a punitive award requires the new jury to be exposed to the facts giving rise to liability. This is necessary because the new jury must acquire an appreciation of the wrongfulness of the conduct in order to consider that factor, as well as others, in fashioning an appropriate award.[2] Also, because the

[2] The retrial proved difficult, from a procedural point of view, because the parties engaged in what amounted to a running debate over what "already had been decided" in the first trial. For example, Defender contended that the first trial resulted in a finding that Northwestern's home office was aware of the fraud and attempted to conceal it. Although the Fourth Circuit commented that one reasonable interpretation of the evidence would lead to such a conclusion, 938 F.2d at 504, this court could not say, as a matter of law, that this question was "decided" at the first trial (and thus relitigation of this issue was foreclosed) because the first jury had returned only a general verdict. In light of the gen-

Mattison decision had identified new factors for juries to consider in determining the amount of a punitive award, the defendant was permitted, over the strenuous objection of the plaintiff, to offer testimony in an area that was not developed at the first trial. Specifically, Northwestern was allowed to introduce testimony regarding the civil and administrative penalties, which the South Carolina Insurance Commission could have and might impose against Northwestern for the conduct at issue here. The defendant was also allowed to introduce testimony that it would have been illegal, under South Carolina law, for Northwestern to make a partial premium refund as its agents had promised. At the conclusion of the trial, the court instructed the jury in compliance with the *Mattison* decision. The jury returned a punitive damage award in the amount of $25 million, exactly five times the punitive award rendered by the first jury.

THE MOTION FOR A NEW TRIAL

The standard to be followed by this court in deciding a motion for a new trial was set forth in *Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350, 352-53 (4th Cir. 1941). Judge Parker wrote for the court:

> On such a motion it is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is

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eral verdict, the court ruled that the only factual issues that had been finally decided were that:

1. An agent of Northwestern made a fraudulent misrepresentation to Defender; and

2. Defender suffered actual damages as a direct and proximate result.

In essence, then, the court required Defender to reprove much of its case (i.e., the subsequent threat, home office involvement, etc). As noted, *infra* at pp. 20-21, Defender clearly was able to again establish these aggravating factors.

> false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. The exercise of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right.

This language has been cited with approval repeatedly during the last forty-five years. *See, e.g., Gill v. Rollins Protective Servs. Co.*, 773 F.2d 592 (4th Cir. 1985); *Wyatt v. Interstate & Ocean Transp. Co.*, 623 F.2d 888 (4th Cir. 1980); *Fischer v. United States*, 318 F.2d 417 (4th Cir. 1963); *Williams v. Nichols*, 266 F.2d 389, 392 (4th Cir. 1959); *see also* 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, §§ 2805 and 2819 (1973).

I

The first ground of error asserted as the basis for a new trial involves the court's decision to admit evidence regarding Northwestern's net worth. Northwestern contends that the *Mattison* decision alters prior South Carolina law and requires the exclusion of the defendant's net worth as an offensive weapon of a plaintiff claiming punitive damages. This issue was timely raised by Northwestern in a pretrial motion *in limine*, which was denied. The court has carefully reviewed its earlier decision and finds no reason to disturb it.

Until recently, juries in South Carolina were given very little guidance in determining the amount of punitive damages to be awarded. Juries were generally instructed that the punitive damage award should reflect:

1) the character of the wrong committed;

2) the punishment which should be meted out; and

3) the ability of the wrongdoer to pay.

See, e.g. Patterson v. Bogan, 198 S.E.2d 586, 590 (S.C. 1973);[3] *see also* SOUTH CAROLINA BAR, CLE DIVISION, SOUTH CAROLINA RECOMMENDED CIVIL JURY CHARGES 1404 (1989). In *Gamble v. Stevenson*, 406 S.E.2d 350 (S.C. 1991), the South Carolina Supreme Court established a post-trial review procedure to be utilized by South Carolina state trial judges when reviewing punitive damage awards. The *Gamble* decision was prompted by the decision of the United States Supreme Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991). *Haslip* upheld a constitutional challenge to an Alabama punitive damage award, relying strongly upon the post-trial review procedure mandated by Alabama law. In *Gamble*, the South Carolina Supreme Court adopted a similar post-trial review procedure for the South Carolina state courts. The factors to be addressed in a *Gamble* post-trial review are as follows:

1) defendant's degree of culpability;

2) duration of the conduct;

3) defendant's awareness or concealment;

4) the existence of similar past conduct;

5) likelihood the award will deter the defendant or others from like conduct;

6) whether the award is reasonably related to the harm likely to result from such conduct;

7) defendant's ability to pay; and finally,

8) as noted in *Haslip*, 'other factors' deemed appropriate.

Gamble, 406 S.E.2d at 354.

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[3] These three factors are derived generally from the RESTATEMENT (SECOND) OF TORTS § 908(2) (1977).

It was in this context that the United States Court of Appeals for the Fourth Circuit decided *Mattison*. In *Mattison*, Judge Niemeyer, writing for a unanimous panel, held that the South Carolina law for awarding punitive damages, applied by the district court in a diversity case, denied the defendant due process in violation of the Fifth Amendment because of its lack of meaningful standards. The opinion proceeds to establish constitutionally required standards which must be incorporated in the federal trial court's jury instructions. The Fourth Circuit was unable to establish a post-trial review mechanism, as the South Carolina Supreme Court had done in *Gamble*, because a federal district court's review of a jury verdict is subject to Seventh Amendment constraints which are not imposed on any state-prescribed post-trial review. In setting out meaningful standards to be included in jury instructions, *Mattison* obviously borrows heavily from the *Gamble* standards. Indeed, *Mattison* explicitly states that the standards enunciated in that opinion are "derived from *Gamble*". 947 F.2d at 110.

Northwestern, however, asserts that the fourth factor to be included in jury instructions, as stated in *Mattison*, is a basis for refusing to allow a wealthy defendant's financial position to be put to the jury. The fourth factor reads as follows:

> *Limitations based on ability to pay*: Any penalty must be limited to punishment and thus may not affect economic bankruptcy. To this end, the ability of the defendant to pay any punitive award entered should be considered.

Id. at 110.

Northwestern strenuously argues that the quoted language of *Mattison* alters prior South Carolina law to the extent that the defendant's ability to pay may henceforth be used only as a shield and not as a sword. The court respectfully disagrees. In *Mattison*, the record reflected

that the defendant's actual net worth was $6,428.00. Thus, in the context of the case being decided, it was necessary to provide appropriate instruction to the trial judge on remand. In that case, the defendant's ability-to pay would serve only as a limitation on the punitive award.

As noted above, prior to *Haslip*, *Gamble*, and *Mattison*, South Carolina law provided for very little in the way of guidance for juries in determining punitive damages. One of the three specific factors that *was* well established, however, was the "ability of the wrongdoer to pay." *See supra*, at p. 5. Had the *Mattison* court wished to abrogate a long-standing South Carolina tort law principle on federal constitutional grounds, it seems likely that the Fourth Circuit would have expressly stated its intention. Moreover, as noted above, *Mattison* purports to simply adopt the *Gamble* post-verdict review standard and incorporate all of those requirements into the jury instructions in a federal diversity case. One factor set out by the court in *Gamble* is the defendant's "ability to pay." No limitation was made on the use of this factor by the court in *Gamble*.

In addition, other language in the *Mattison* decision seems to imply that the defendant's ability to pay is a factor that may be used in establishing an award. *See Mattison*, 947 F.2d at 105 (". . . the net worth of the defendant, *while relevant*, is not a limiting factor [under present South Carolina standards]") [emphasis added].

For the foregoing reasons, the court finds no error in its decision to allow evidence regarding the net worth of Northwestern.

A separately stated, though interrelated, ground of error is the assertion that the court "erroneously failed to charge the fourth aspect" set forth in *Mattison* and "substituted its own version of South Carolina law" on that point. This alleged error is no more than a reassertion of the

argument that the net worth of Northwestern should not have been admitted. The court has reviewed its jury charge regarding the fourth element of the *Mattison* decision and has determined that the jury charge follows the requirements of *Mattison*, with the exception that the jury was told that net worth may be considered both offensively and defensively. In accordance with *Mattison*, the jury was specifically advised that the amount of the punitive award should not "effect economic bankruptcy."

II

The next ground of error asserted by Northwestern relates to certain paragraphs contained in contracts entered between Northwestern and its agents, which were introduced in an effort to demonstrate the control and supervision that Northwestern exercised over its agents including the agents who committed the fraudulent acts at issue here. The question of whether, and to what extent, the upper echelons of Northwestern participated in the wrongful conduct was the most hotly debated issue on retrial. To this end, the court allowed Northwestern, over Defender's objections, to introduce its contracts with its agents. At the first trial, Judge Henderson refused to allow these contracts into evidence and granted Defender's motion to strike all testimony relating to the issue. On retrial, Northwestern persuaded this court that the contracts did, in fact, demonstrate that Northwestern attempted to assert a degree of control and supervision over its agents. Accordingly, the contracts were allowed into evidence over the objection of Defender. The court did agree with Defender in two respects, however, and ordered that certain language in the contracts be redacted and not considered by the jury.

Specifically, the court ordered that paragraph four, defining the agent as an independent contractor, be deleted. That paragraph read as follows:

> *Relationship*—Agent shall be an independent contractor and nothing herein shall be construed to make Agent an employee of the Company, General Agent or First Party. Agent shall be free to exercise his own judgment as to the persons from whom he will solicit Applications and the time, place and manner of solicitation, but the Company from time to time may adopt regulations respecting the conduct of the business covered hereby, not interfering with such freedom of action of Agent.

The court also redacted paragraph nine which purported to require the agents to indemnify the company. The specific language redacted reads as follows:

> *Responsibility*—Agent shall be responsible to First Party and the Company for all business done by or entrusted to his agents or persons employed by him. He shall indemnify and save First Party, District Agent, General Agent and the Company harmless from any and all expenses, costs, causes of action and damages resulting from or growing out of acts or transactions by himself or his employees or agents.

The court excluded these two paragraphs from the jury's consideration relying upon Rule 403 of the Federal Rules of Evidence. That rule provides, in pertinent part, that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Fed. R. Evid. 403.

The earlier trial in this action resulted in a jury determination that Northwestern was liable for the actual and constructive fraud of its agents. Thus, to allow evidence regarding an alleged independent contractor relationship and an obligation by the agents to indemnify the insurance company would have only served to confuse the issues and possibly mislead the jury. In other words, an earlier jury has already determined that, for purposes of

the acts complained of in this case, the acts of Northwestern's agents are to be imputed to the company. A contractual provision to the contrary would confuse the issues. Additionally, to the extent that a provision regarding indemnity by the agents for their fraudulent acts constitutes an effort to "control" the agents, the effort was minimal at best. Moreover, if the jury fully understood the import of the indemnification paragraph, the jury might then feel that it was called upon to make a determination of the punitive damages factors as applied to the *agents* and not to Northwestern. This would also confuse the issues. Accordingly, the court concludes that its earlier decision to redact these two paragraphs from the contracts, all of which were totally excluded by Judge Henderson, was not error.

III

Northwestern next argues that evidence was improperly admitted regarding the financial condition of Kathryn Inabinet Vickery, a co-plaintiff in this action. Ms. Vickery was originally named as a party plaintiff in this case and was dismissed prior to the first trial. Before the case could be tried a second time, Northwestern moved to compel responses to certain discovery requests which sought to elicit the fact that Ms. Vickery, along with the Kathryn Inabinet Vickery Marital Trust, still retains a contractual right to a portion of the punitive damage award. Northwestern argued that if other parties besides Defender had an interest in the punitive award, then they needed to be added as co-plaintiffs. Defender initially objected to producing this information, and the court ordered that it be produced. Thereafter, prior to trial, Defender, having conceded that Ms. Vickery and the Marital Trust did retain a financial interest in the punitive award, moved that both be joined as party plaintiffs. Without objection from Northwestern, the court granted the motion.

On retrial, Northwestern attempted to, and did, put before the jury the proposition that Ms. Vickery was a wealthy woman. For example, while examining Kurt Cowan, a Northwestern employee, counsel for Northwestern elicited the fact that Ms. Vickery had a "sizeable estate." Record, Vol. I, at 192. The witness also made reference to Ms. Vickery's "personal worth." *Id.* The Northwestern witness was allowed to emphasize that her estate taxes alone were estimated to range between $5 million and $8 million.

Later in the trial, James R. Jones, a certified public accountant was called as a witness by Defender. Among other things, he was asked about the fact that Ms. Vickery's financial condition had worsened between the time that the life insurance policy was applied for and the date of the second trial. When Northwestern objected, the court responded that the door had been opened on this issue, during Cowan's testimony, and that testimony regarding Ms. Vickery's eroded personal financial condition would be admitted.

The court determined that admitting the testimony regarding Ms. Vickery's true financial picture was necessary to correct the false impression that had been created by Northwestern.

Additionally, when Northwestern's counsel cross-examined Mr. Jones, he again raised the subject of Ms. Vickery's worth by questioning Mr. Jones about what percent of her estate would represent estate taxes. Record, Vol. II, at 166. Plaintiff's counsel objected to this line of questioning, and the court, consistent with its earlier ruling, allowed limited questioning of the witness regarding the fact that estate taxes upon an estate the size of Ms. Vickery's would be approximately fifty percent. Calculating from this figure, defense counsel elicited from Mr. Jones that Ms. Vickery's estate, at the time of the application for the policy, ranged between $10 million and $16 million.

In short, it was Northwestern, not Defender, who first injected the collateral matter of Ms. Vickery's personal worth into the case. Having done this, Northwestern cannot now be heard to complain that Ms. Vickery's financial position was improperly allowed into evidence.

Northwestern's efforts to portray Ms. Vickery as a wealthy woman, through the Cowan and Jones testimony, was not the first time during the trial that Northwestern sought to put before the jury the effect that a punitive award would have upon the recipient, nor was it the last. In opening statement, counsel for Northwestern told the jury "you have the power to make him [plaintiffs' counsel] rich. You have the power to make all these people who are going to testify on behalf of Defender rich." Record, Vol. I, at 33.

The court agrees with Northwestern's current position that the financial wealth, or lack thereof, of a punitive damage plaintiff is totally irrelevant to the jury's consideration. To this end, the court strictly admonished counsel prior to closing argument that it would not permit argument on this issue. Record, Vol. II, at 221-22. Nevertheless, Northwestern's counsel, in closing argument, stated to the jury "It looked like she had an estate worth somewhere between 7, 15, $16 million." Record, Vol. IV, at 59.

In short, Northwestern has no standing to complain about the admission of Ms. Vickery's net worth because it was Northwestern who clearly opened the door through its opening statement and its own cross-examination of one of its own witnesses. It then continued to pursue this issue later in the trial in its cross-exmaination of Jim Jones and in its closing argument. Defender did not argue this issue to the jury, and the court's instructions on the law properly stated what was to be considered by the jury. In fact, the court told the jury that the plaintiffs had been paid their actual damages plus interest. The focus of the trial was squarely on the conduct of North-

western and what it would take to punish Northwestern for fraud. Under these circumstances, the court perceives no error in the admission of testimony regarding Ms. Vickery's financial status; alternatively, the error, if there was one, was harmless.

IV

Northwestern next argues that the court improperly precluded it from introducing evidence regarding the date on which the policy was delivered. The court's ruling in this regard was premised upon footnote one in Judge Henderson's order reducing the punitive award in the first trial. *Defender Industries*, 727 F. Supp. at 255 n.1 ("The evidence indicates that Northwestern did not deliver a written policy to Defender until after Defender requested a reduction in coverage and rebate. The policy did not include a rebate term"). Northwestern did not take exception to this purported finding by Judge Henderson on appeal, and the finding was reiterated by the Fourth Circuit in its opinion:

> With this understanding, Defender purchased a policy for $8,000,000 of coverage. Northwestern maintained possession of the policy and did not deliver it to Defender until after the dispute precipitating this law suit arose.

983 F.2d at 503. Northwestern argues that footnote one in Judge Henderson's order was a gratuitous statement contained in a recitation of the facts viewed in the light most favorable to the non-moving party. The same argument is made with regard to the statement made in the Fourth Circuit opinion.

Although Northwestern strenuously argues that the delivery date has not been finally determined, its post-trial memorandum is noticeably bereft of any explanation of why the delivery date is relevant to the question of the amount of punitive damages to be awarded. Although

Northwestern might be technically correct in that the delivery date has not been determined as a matter of law, any error in disallowing this testimony was unquestionably harmless. Defender's counsel made but a passing reference to the delivery date in closing argument. Record, Vol. IV, at 38.

V

Northwestern next contends that the South Carolina law of punitive damages, as charged and applied in this case, violates its rights under the Due Process and Equal Protection Clauses of the United States Constitution.[4] Northwestern belatedly sought to raise these issues in the earlier appeal. *See Defender Industries*, 938 F.2d at 509 n.3. After the case was remanded, Northwestern sought, and received, permission from this court to amend its answers so as to raise these additional constitutional challenges. Although the issues are now properly before the court, the court is of the opinion that any constitutional due process challenge to the South Carolina law of punitive damages has been answered by the Fourth Circuit in the *Mattison* decision and that the equal protection challenge is without merit.

As noted above, this court faithfully attempted to follow the requirements of *Mattison*, except for the issue of the defendant's net worth, which was not a factor in the *Mattison* case. Accordingly, the due process challenge is denied.

Northwestern also asserts that the South Carolina punitive damages scheme violates the equal protection clause of the Fourteenth Amendment because it allows juries to discriminate against the wealthy.[5] The United

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[4] The equal protection challenge was raised in *Mattison*, and the court refrained from addressing it. *See Mattison*, 947 F.2d at 101 n.3.

[5] Although the court will undertake a traditional equal protection legal analysis in deciding the issue, it bears noting that North-

States Supreme Court, however, has clearly stated that courts are reluctant to overturn governmental action on the ground that it denies equal protection of the laws, unless it burdens a suspect classification or a fundamental interest. *Vance v. Bradley*, 440 U.S. 93, 96-97 (1979); *see also United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 174 (1980). Thus, the court must first determine whether the South Carolina scheme of punitive damages "operates to the disadvantage of some suspect class or impinges upon a fundamental right explictly or implicitly protected by the Constitution. . . ." *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). If it does, then the court must apply a strict judicial scrutiny test, in which the state law would be upheld only if it is necessary to promote a compelling state interest. *See Hernandez v. Texas*, 347 U.S. 475 (1954). If not, the state law is valid if it is "rationally related to furthering a legitimate state interest." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976).

Northwestern contends that "classifications similar to the traditional idea of punitive damages, based solely upon wealth, have long been held suspect by the Supreme Court." Defendant's Brief at 10 (citing *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 18-22 (1973); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 668 (1966); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Engel v. O'Malley*, 219 U.S. 128 (1911)). Two of the

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western's fundamental premise (*i.e.*, that wealthy defendants are discriminated against because punitive awards are based on their ability to pay) may be flawed. If an impecunious defendant is called upon to pay punitive damages of $50 (10% of his net worth of $500) and a more well-to-do defendant is called upon to pay punitive damages of $5,000 (10% of *his* net worth of $50,000), has there been unequal treatment of the more wealthy defendant merely because, in terms of raw dollars, the award against him was higher? Given the fact that the primary purpose of punitive damages is to punish the tortfeasor, there would appear to be no unequal treatment to the more wealthy defendant.

cases cited by Northwestern, *Rodriguez* and *Engel*, however, expressly hold that at least some unequal treatment based upon wealth is constitutionally permissible. In *Engel* the Court upheld a banking regulation scheme that allegedly discriminated against less wealthy businesses. In *Rodriguez* the court examined the Texas scheme for funding public education, which allegedly benefitted the wealthy and burdened the poor. The Court upheld the Texas public school funding scheme stating that "a sufficient answer to appellees' argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." *Rodriguez*, 411 U.S. at 24.

Furthermore, neither *Harper* nor *Griffin* holds that wealth by itself is a basis for a suspect classification. Rather, they hold that the deprivation of fundamental rights based upon a person's indigence is unconstitutional. In *Harper*, the Court held that a poll tax was unconstitutional because it impinged upon the fundamental right to vote. "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Harper*, 383 U.S. at 670. In *Griffin*, the Court held that a state statute that denied adequate appellate review to the poor although granting such review to all others was unconstitutional because it impinged upon the fundamental right to a fair trial. In this case, Northwestern has not asserted that the South Carolina punitive damages scheme impinges upon any fundamental right guaranteed by the Constitution.

Northwestern has cited no authority for its position that discrimination against the wealthy is constitutionally prohibited. To the contrary, the Supreme Court recognized that "this Court has never heretofore held that wealth discrimination alone provides an adequate basis for in-

voking strict scrutiny . . . ." *Rodriguez*, 411 U.S. at 29. The cases cited by Northwestern, at best, hold that indigent people constitute a suspect class, which should be afforded constitutional protection. In *Rodriguez*, the Court distinguished the alleged discrimination in that case from cases in which the lack of personal resources has occasioned an absolute deprivation of a desired benefit. *Rodriguez*, 411 U.S. at 23. Thus, the Court has only afforded constitutional protection based upon wealth to indigents and only when the state law absolutely deprives the indigents of a significant, if not a fundamental, right.

Finally, in this case Northwestern complains generally that the South Carolina punitive damages scheme discriminates based upon wealth, but Northwestern has not even attempted to define the class to which it belongs or to show that such class is a suspect class. In *Rodriguez* the plaintiff argued that the class consisted of poor people in general in the state of Texas. The Court stated:

> However described, it is clear that appellees' suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts. The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Id. at 28.

This court, consistent with *Rodriguez*, finds that Northwestern is not a member of a suspect class and that

wealth discrimination alone does not provide an adequate basis for invoking strict scrutiny.

Thus, to find that the South Carolina scheme of punitive damages violates Northwestern's equal protection right, the court must conclude that the punitive damages scheme is not rationally related to furthering any legitimate state interest.

In *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032, 1041 (1991), the Court recognized that Alabama's common-law rule that a corporation is liable under respondeat superior for fraud committed by its agents had a rational relation to a legitimate state interest of deterring fraud. The Court recognized, "[i]mposing liability without independent fault deters fraud more than a less stringent rule. It therefore rationally advances the State's goal." *Id.* In this case, the South Carolina scheme of punitive damages, which allows a jury to punish wealthier defendants more to effect a proportionally equal deterrent, would also tend to deter fraud more than a less harsh rule. It therefore rationally advances South Carolina's goal of deterring fraud. Thus, the court finds that the South Carolina scheme of punitive damages is rationally related to a legitimate state interest.

The court, therefore, finds no merit to Northwestern's equal protection challenge to South Carolina's scheme of punitive damages.

VI

Northwestern finally argues that the amount of the award is excessive under federal and state law. The amount of the award is asserted as a basis for a new trial outright. Although the court disagrees that the excessiveness of the award justifies a complete new trial, the court will order a new trial *nisi* remittitur as noted below. Accordingly, the discussion of the excessiveness of the punitive award will be discussed in the following section.

REMITTITUR

As noted above, Northwestern initially moved for a new trial and did not seek a remittitur order of this court. At oral argument on Northwestern's motion, the court ventilated this issue on its own, and invited the parties to submit memoranda directed to the question of whether the damage award should be remitted. These memoranda have been received and carefully reviewed by the court. Northwestern contends, as it did with the first verdict, that the punitive award is clearly excessive and as a result of passion, caprice or prejudice on the part of the jury. Northwestern asserts that to allow the $25 million punitive damage award to stand would result in a miscarriage of justice. For the reasons set forth below, the court agrees that the award is excessive and must be reduced.

The essential facts giving rise to Northwestern's liability for actual and constructive fraud have been thoroughly described in both Judge Henderson's reported decision and the United States Court of Appeals opinion reversing Judge Henderson. These essential facts will not be repeated in full here. With two exceptions, noted below, the testimony on retrial was in no material respect different from what has been reported in these earlier decisions. In short, Northwestern's agents sold Defender a policy with an explicit promise that the insurance policy on Kathryn Vickery's life would be reduced and a partial premium refund made, if Defender so requested, at a given point in the future. Northwestern thereafter refused to reform the policy as promised and refused to refund the premium. When Defender protested, a Northwestern agent made a direct threat that Northwestern could cause Defender to lose one of its largest customers in the event Defender canceled the policy.[6] Defender complained to

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[6] This one customer generated revenues for Defender of $2 million to $3 million per year.

the Chief Executive Officer of Northwestern who, upon investigation, learned that the conduct about which Defender complained had, in fact, occurred. Nevertheless, the CEO wrote to Defender and indicated that the policy would not be reformed and that Northwestern saw no reason to discipline its agents. As noted by the Fourth Circuit, the evidence was susceptible to the inference that the upper echelon of Northwestern's management was aware of the misconduct and attempted to conceal it. On retrial, it was revealed that in spite of the first award, Northwestern has still failed to discipline any of the agents involved.

Additionally, in the second trial, Northwestern sought to introduce new evidence regarding two mitigating factors. Specifically, Northwestern sought to put before the jury the proposition that the refund promise, if carried out, would have been illegal under South Carolina law. S.C. CODE ANN. § 38-55-50 (Law. Co-op. 1989). Defender argued that to allow this testimony would be unfair, because at no time since the dispute erupted had Northwestern ever asserted illegality as a defense to the refund request. The court carefully examined the transcript of the earlier trial and concluded that illegality, *per se*, was not raised as an issue in that case. However, one of Northwestern's agents who testified in the first trial had made a passing reference to the fact that a partial refund would have amounted to "discrimination," a term used in the statute making refunds illegal. Northwestern was able to convince the court that this reference was a sufficient wedge to allow Northwestern to fully develop testimony in the second trial that Northwestern was prevented from making the refund payment because to do so would be "illegal" under South Carolina law.

A second area of new testimony centered on the civil and administrative penalties that Northwestern faces because of the conduct which has been brought to light by this litigation. Again, over Defender's strong objections,

the court permitted the testimony. Northwestern successfully argued that because the intervening *Mattison* decision had explicitly recognized that "other penalties for the conduct," including civil and administrative penalties, may be considered by juries in fashioning a punitive award, the issue should be fully developed on retrial.[7] Accordingly, Northwestern was allowed to introduce evidence to the effect that violation of the applicable South Carolina insurance laws may subject an insurance company to monetary fines and suspension or revocation of the privilege to sell insurance in South Carolina. *See generally*, S.C. CODE ANN. § 38-2-10 (Law. Co-op. 1989).

Although Defender initially opposed the injection of the illegality and civil penalty issues into the new trial, Defender attempted to make the most of the adverse rulings, and, in retrospect, appears to have been able to capitalize upon this new testimony to some extent. Although the new testimony regarding South Carolina's prohibition of insurance premium refunds allowed Northwestern to argue to the jury that its hands were tied by the law making such refunds illegal, Defender countered by arguing that Northwestern should be severely punished for allowing its agents to make a promise to do what they knew to be an illegal act. With regard to civil penalties, Defender was able to stand this issue on its head by suggesting that, although the South Carolina Insurance Commission had, and retains, the power to sanction Northwestern administratively, no such action has been taken by the insurance commission in the seven years since Northwestern's fraudulent conduct occurred. Thus, Defender was able to argue that punitive damages were

[7] Actually, *Mattison's* articulation of this factor did not represent a recognition of an altogether new factor to be considered, as Northwestern suggests. In fact, Judge Henderson recognized this as a factor in her opinion reducing the first punitive award. *See* 727 F. Supp. at 260 n.17.

necessary as a deterrent in this case because, quite obviously, the administrative sanctions had not been invoked and, in all likelihood will not be invoked in the future.

Finally, as was true at the first trial, the evidence disclosed that Northwestern is an exceedingly large and successful insurance company, having a net worth of over $35 billion and having gross income in South Carolina of approximately $20 million per year.

This brief review of the pertinent evidence[8] demonstrates quite forcefully that punitive damages were appropriate in this case. Defender has once again demonstrated multi-tiered wrongdoing on the part of Northwestern and its agents. This wrongdoing included fraudulent conduct, threats of reprisal, and concealment. Additionally, the evidence was susceptible to the inference that high ranking Northwestern officials participated in the fraud. Two South Carolina juries, totaling twenty South Carolina citizens, have both found that a substantial punitive award is appropriate in this case. On retrial, the court sided with Northwestern on the two most difficult evidentiary issues and allowed in new testimony regarding mitigating factors. Additionally, the court attempted to carefully follow the mandate of the *Mattison* decision and instruct the jury on the four aspects of the law of punitive damages recognized in that decision, which was clearly intended to be a moderating influence on punitive awards in South Carolina. In sum, the court is firmly convinced that a substantial punitive award against Northwestern is appropriate in this case.

Having determined that a substantial award is appropriate, however, the court is constrained to conclude that a punitive award of $25 million, even given the highly inappropriate conduct which occurred here, is excessive

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[8] This opinion recites the evidence in the light most favorable to Defender.

and must be reduced. As noted by Judge Henderson in her order reducing the first award, the harm Defender suffered did not involve personal injury or property damage. It involved a loss of just over $100,000 (and arguably only $13,000, the difference between the premiums for the initial coverage and the reduced coverage requested later) by a large company. There was no showing that the conduct which occurred here was part of a normal pattern or practice by Northwestern or that this activity is likely to be repeated in the future.

Defender argues, quite correctly, that South Carolina decisions have repeatedly held that there is no mathematical formula to be applied in determining a punitive damage award. *Hicks v. Herring*, 144 S.E.2d 151, 154 (S.C. 1965). In other words, there is no appropriate ratio between actual damages and punitive damages. *Rogers v. Florence Printing Co.*, 106 S.E.2d 258, 262 (S.C. 1958).

Although there is no mathematical formula by which a punitive award can be compared to an actual damage award, the punitive award must not be "grossly disproportionate" to the severity of the offense. This proposition was recognized by the South Carolina Supreme Court in *Gamble*, 406 S.E.2d at 354 ("upon completing its review, *dedicated to the postulate that no award be grossly disproportionate to the severity of the offense*, the trial court shall set forth its findings on the record.") [emphasis added]. The *Mattison* court quoted this language verbatim and then said:

> Providing standards to follow in the course of the review, the court not only permits consideration of the *Haslip* factors, but directs that *no punitive damages award shall be 'grossly disproportionate' to the severity of the conduct.*

Mattison, 947 F.2d at 106 [emphasis added].

Application of the foregoing principle to the punitive award here leads to the inescapable conclusion that the award is grossly disproportionate to the severity of the conduct which occurred here.

Defender vigorously argues that a punitive award of $25 million is necessary to appropriately "punish" a wealthy defendant such as Northwestern. It points to the fact that Northwestern has a net worth in excess of $35 billion, that it earns over $6.9 million per day in interest on its investments, and that if the South Carolina Insurance Commission had revoked its license to write insurance in South Carolina for only one year, Northwestern would have suffered a loss of gross premiums of over $20 million.

This case dramatically demonstrates the inherent tension that exists among the various factors to be addressed in assessing punitive damages. In this case, if one looks solely at the ability of the wrongdoer to pay, a $25 million punitive award might be justified. However, the ability of a financially sound defendant to pay a punitive award is but one of many factors which must be considered. This court must be mindful of *Mattison's* admonition that "any penalty imposed should bear a relationship to the nature and extent of the conduct and the harm caused, including the compensatory damage award made by the jury." 947 F.2d at 110. Accordingly, the court concludes that a substantial reduction in the punitive award is appropriate in this case.

There are three general approaches that have been recognized for determining the appropriate amount of a remittitur:

1) The excessive verdict may be reduced to the minimum amount that the jury could have awarded.

2) The excessive verdict may be reduced to the maximum amount that the jury could have awarded.

3) The excessive verdict may be reduced to whatever amount the reviewing court thinks the jury should have awarded.

K-B Trucking Co. v. Riss Int'l Corp., 763 F.2d 1148 (10th Cir. 1985); *see also* 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2815, at 104-05 (1973). Professors Wright and Miller clearly favor the second of these approaches as the only one passing constitutional muster under the Seventh Amendment. *Id.* A remittitur order reducing a jury's award to the outer limit of the proof has been recognized as the appropriate remedy by numerous courts considering the three recognized approaches. *See, e.g. K-B Trucking Co.*, 763 F.2d at 1163; *Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1448 (11th Cir.) *cert. denied* 474 U.S. 1005 (1985); *Dixon v. International Harvester Co.*, 754 F.2d 573, 590 (5th Cir. 1985); *Caldarera v. Eastern Airlines, Inc.*, 705 F.2d 778, 784 (5th Cir. 1983); *Glazer v. Glazer*, 278 F. Supp. 476, 482 (D.La. 1968). This approach is also the preferred view of other commentators. *E.g.*, FLEMING JAMES, JR., CIVIL PROCEDURE § 7.21, at 326 (1965); 6A JAMES W. MOORE & JO DESHA LUCAS, MOORE'S FEDERAL PRACTICE ¶ 59.08[7], at 59-193 to 195 (1989). Agreeing with these authorities, the court adopts the view that any reduction in the award of the verdict here should be to the *maximum* that this court finds a reasonable jury could award in light of the evidence in this case.

After carefully reviewing and reflecting upon all of the testimony that occurred in the second trial, the court has concluded that the punitive award should be reduced to $5 million. Giving due consideration to the relationship to the harm caused, other penalties for the conduct which occurred, improper profits and the plaintiffs' costs, and the ability of the defendant to pay, the court finds and concludes that $5 million is the most that a reasonable jury could award by way of punitive damages in this case.

Lest the court be accused of second guessing Judge Henderson's determination that $10,000 was appropriate, it should be noted that *two* South Carolina juries, independently reviewing the evidence, have now concluded that a substantial award should be made in this case, thus indicating that the first jury verdict was not an aberration. Additionally, Northwestern prevailed on nearly every legal issue in dispute at the second trial. That is to say, the court required Defender to reprove much of its case, despite Defender's arguments that certain issues were res judicata; [9] the court allowed into evidence documentary evidence introduced by Northwestern that Judge Henderson had excluded; [10] the court allowed Northwestern to offer evidence in mitigation that was not introduced at the first trial; [11] and the court charged the jury in accordance with *Mattison*. Moreover, the testimony in the second trial was, in three specific respects, more damaging to Northwestern. First, Northwestern had not taken steps to fire or otherwise discipline its employees who were involved in the fraudulant conduct, despite the fact that the 1985 conduct had been unanimously found to be fraudulent by a jury, a judge of this court, and an en banc panel of the United States Court of Appeals for the Fourth Circuit. Second, the promises made were illegal under South Carolina law, a fact not made known to the first jury and not argued to Judge Henderson. Finally, although the South Carolina Insurance Commission has sweeping powers to administratively discipline Northwestern for what occurred, it has not done so and quite obviously does not intend to do so in light of the fact that seven years have elapsed since the conduct occurred. For all of these reasons, the court finds

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[9] *See supra* note 2.

[10] *See supra*, at pp. 9-11.

[11] *See supra*, at pp. 3-4.

that the maximum figure that a reasonable jury could have returned is $5 million.

For the foregoing reasons, it is ordered that the defendant's motion for a new trial on the grounds discussed in parts I through VI of this order be, and the same hereby is, denied.

It is further ordered that the plaintiffs, Defender Industries, Inc., Kathryn Inabinet Vickery, and the Kathryn Inabinet Vickery Marital Trust remit all in excess of $5 million punitive damages within ten (10) days upon condition that a new trial be granted as to punitive damages only if they fail to do so.[12]

IT IS SO ORDERED.

/s/ Joseph F. Anderson, Jr.
JOSEPH F. ANDERSON, JR.
United States District Judge

April 29, 1992
Columbia, South Carolina

[12] Northwestern has moved to certify the legal issues addressed herein for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The motion is denied, for now, without prejudice. Northwestern may renew the motion if Defender declines to accept the remittitur and opts for a new trial.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

C/A No.: 3:88-3231-17

DEFENDER INDUSTRIES, INC., KATHRYN INABINET VICKERY, and the KATHRYN INABINET VICKERY MARITAL TRUST,

Plaintiff,

v.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,

Defendant.

[Filed May 20, 1992]

Two matters are currently before the court: (1) the motion of Northwestern Mutual Life Insurance Company (Northwestern) to amend the court's April 29, 1992 order, and (2) the remittitur of the punitive damages award.

I. AMENDMENT OF THE PRIOR ORDER

The court first notes that the court's April 29, 1992 order recited the facts as viewed in the light most favorable to the plaintiffs, Defender Industries, Kathryn Inabinet Vickery, and the Kathryn Inabinet Vickery Marital Trust (Defender). *See* April 29, 1992 order at 23 n.8.

Upon the motion of Northwestern, the court amends its April 29, 1992 order in two respects. First, the language in the prior order on pages 2 and 20 dealing with

the "Springs threat" shall be modified to reflect that the "Springs threat" was not made at the time that Defender made its refund request in 1987. Instead the "Springs threat" was made by the Northwestern agents some time in late 1986. The evidence, viewed in the light most favorable to Defender, however, still supports Defender's position that the "Springs threat" was made during the course of the insurance relationship and for the purpose of coercing Defender into maintaining the Northwestern policy at the highest coverage level.

Second, the court's prior order states that Defender complained to Northwestern's chief executive officer, Donald J. Schuenke, who wrote Defender and stated that the policy would not be reformed. *See* April 29, 1992 order at 20-21. The court now amends that portion of its prior order to reflect that it was Northwestern's Assistant Director of Agencies, Michael Matone, and not Schuenke, who investigated the Defender complaint, concluded that no refund promise had ever been made, and refused to rescind the policy. The court, however, notes that Schuenke had knowledge of the decision made by Matone. *See* Letter from Matone to Cone of 5/15/87, at 2 ("cc: D. J. Schuenke").

II. REMITTITUR

The plaintiff having filed an acceptance of remittitur with this court, the clerk is hereby authorized to enter judgment in favor of the plaintiff in the amount of $5,000,000 punitive damages.

IT IS SO ORDERED.

/s/ Joseph F. Anderson, Jr.
JOSEPH F. ANDERSON, JR.
United States District Judge

May 19, 1992
Columbia, South Carolina

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Case Number 3:88-3231-17

DEFENDER INDUSTRIES, INC.,
KATHRYN C. INABINET VICKERY and
THE KATHRYN C. INABINET VICKERY TRUST

v.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY

JUDGMENT IN A CIVIL CASE

[Filed February 7, 1992]

☒ Jury Verdict. This action came before the Court for a trial by jury on remand from the Fourth Circuit Court of Appeals on the issue of Punitive Damages only.

IT IS ORDERED AND ADJUDGED that the plaintiffs, Defender Industries, Inc., Kathryn C. Inabinet Vickery and The Kathryn C. Inabinet Vickery Trust, recover of the defendant, Northwestern Mutual Life Insurance Company, the sum of Twenty-Five Million and NO/100 ($25,000,000.00) Dollars, punitive damages, with post judgment interest at the rate of 4.21 per cent and its costs of action.

NOTATION: The plaintiffs, per Order filed April 29, 1992 and agreement filed May 13, 1992, will remit all

punitive damages in excess of Five Million ($5,000,000.00) Dollars. Therefore,

the plaintiffs shall recover of the defendants punitive damages in the amount of Five Million ($5,000,000.00) Dollars.

Date February 7, 1992

ANN A. BIRCH
Clerk

/s/ Becky Wilson
BECKY WILSON
(By) Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
D. SOUTH CAROLINA
COLUMBIA DIVISION

Civ. A. No. 3:88-3231-16

DEFENDER INDUSTRIES, INC.,
Plaintiff,

v.

THE NORTHWESTERN MUTUAL
LIFE INSURANCE COMPANY,
Defendant.

Dec. 15, 1989

ORDER

HENDERSON, District Judge.

This matter is before the Court on the post-trial motions of the defendant, The Northwestern Mutual Life Insurance Company ("Northwestern"), and the plaintiff, Defender Industries, Inc. ("Defender"). Northwestern moves for judgment notwithstanding the verdict, for a new trial or for a remittitur. Fed.R.Civ.P. 50(b). Defender moves the Court to amend the judgment to add prejudgment interest. For the reasons set forth below, the Court sets aside the punitive damages award and modifies it, grants the plaintiff's motion for prejudgment interest on the actual damages award and denies the remaining motions.

On motion for judgment n.o.v., the Court must consider the record as a whole and in the light most favorable to the party opposing the motion and, if there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment could reasonably return a verdict for the non-moving party, the motion should be denied. *Wyatt v. Interstate & Ocean Transp. Co.*, 623 F.2d 888, 891 (4th Cir.1980).

I.

Viewed in the light most favorable to the plaintiff, the facts are as follows. In 1985, Defender was in the process of evaluating various life insurance policies it had on its key employees and executives. Agents of Northwestern met with officers of Defender in hopes of selling Defender new policies to replace some that were then in effect. The Northwestern agents procured applications for new policies from Defender. The Defender employees and executives who were potential insureds then submitted to physical examinations. The Northwestern agents sold Defender several policies and were eager to provide a policy on the life of Kathryn C. Inabinet, Defender's chairman of the board, in the amount of Eight Million ($8,000,000) Dollars. Defender was uncertain at the time, however, as to the amount of coverage it needed for Inabinet; estate taxes in the event of her death were projected to range from Five Million ($5,000,000) to Eight Million ($8,000,000) Dollars. Because Defender already had in effect with another company a life insurance policy covering Inabinet in the amount of Five Million ($5,000,000) Dollars. Defender's officers felt it best to delay purchasing a replacement policy until they had a better idea of the amount of coverage needed. In order to close the deal, one of Northwestern's agents promised Defender's officers that, if Defender then purchased a policy for Eight Million ($8,000,000) Dollars. Inabinet's maximum insurability, it could later reduce the amount of

coverage and receive a rebate for the difference in premiums. Defender agreed to this term and purchased the policy.[1] Several months later Defender asked Northwestern to reduce the amount of coverage to Seven Million ($7,000,000) Dollars and to credit Defender with the difference in premiums paid from the date the policy was purchased. Northwestern agreed to reduce the amount of coverage but refused to rebate the difference in premiums. Defender then requested rescission of the contract; Northwestern refused. Defender let the policy lapse and brought this action claiming breach of contract, breach of contract accompanied by a fraudulent act, fraud, constructive fraud, outrage and negligence.

At trial, Northwestern was granted leave to amend its answer to assert as an affirmative defense that the alleged promise to rebate the premium, if made, would be unenforceable as a violation of S.C.Code Ann. § 38-55-50 (1976, as amended).[2] At the close of all of the evidence,

[1] The evidence indicates that Northwestern did not deliver a written policy to Defender until after Defender requested a reduction in coverage and rebate. The policy did not include a rebate term.

[2] Section 38-55-50 provides in pertinent part:

> "An insurer, its agent, or an insurance broker doing business in this State may not make or permit any discrimination in favor of individuals between insureds of the same class and risk involving the same hazards in the amount of the payment of premiums or rates charged for policies of insurance . . . in the dividends or other benefits payable, or in any other of the terms and conditions of the contracts it makes. . . . An insurer or its officer, agent, solicitor, or representative or an insurance broker may not pay, allow, or give or offer to pay, allow, or give, directly or indirectly, as inducement to the taking of insurance any rebate of premium payable on the policy, any special favor or advantage in the dividends or other benefits to accrue from the policy, . . . or any valuable consideration or inducement not specified in the policy contract of insurance. . . ."

Defender withdrew its outrage claim. The Court granted Northwestern's directed verdict motions on the negligence, breach of contract and breach of contract accompanied by a fraudulent act claims. The Court concluded, however, that section 38-55-50 ("the statute") was not designed to shield a fraud and that Defender's fraud and constructive fraud claims survived.

The jury returned a verdict for Defender on both the fraud and the constructive fraud claims in the amount of One Hundred Six Thousand, Five Hundred Thirteen and 74/100 ($106,513.74) Dollars in actual damages and Five Million ($5,000,000) Dollars in punitive damages.

II.

Northwestern first contends that it is entitled to judgment n.o.v. on the ground that as a matter of law Defender had no right to rely on the promise to rebate the premium. One of the nine elements of a fraud action is the hearer's right to rely on the truth of the alleged misrepresentation. *See Mylin v. Allen-White Pontiac, Inc.*, 281 S.C. 174, 314 S.E.2d 354 (Ct.App.1984). Northwestern contends that because the statute prohibits an insurance agent from paying, allowing or giving, or offering to pay, allow or give, a rebate of premium, no one to whom such an offer is made has a right to rely on such a promise.

Because this action arises under the Court's diversity jurisdiction, South Carolina law applies. *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Although the statute has been construed several times, there appears to be no controlling South Carolina precedent as to whether the statute would as a matter of law preclude a plaintiff's right to rely on a promise to rebate a premium. This Court's duty as to a question of substantive law the South Carolina courts have not yet ruled on is to foretell the South Carolina Supreme Court's decision if presented with the same question. *Patel by*

Patel v. McIntyre, 667 F.Supp. 1131 (D.S.C.1987), *aff'd* 848 F.2d 185.

This Court concludes that South Carolina would hold that the statute does not as a matter of law preclude a plaintiff's right to rely on an insurance company's promise to rebate a premium. First, the statute does not expressly prohibit a promisee's bringing legal action on such a promise. More important, the South Carolina Supreme Court has held that the predecessor statute to section 38-55-50, which contained virtually the same language, was not intended to shield a fraud. In *Crosby v. Metropolitan Life Insurance Co.*, 167 S.C. 255, 166 S.E. 266 (1932), the plaintiff, who purchased a policy on her cousin's life, brought a fraud action against the insurer when it refused to pay her the policy proceeds on the cousin's death. The agent had told her she was the beneficiary but the written policy named the insured's estate as beneficiary. As a defense to the fraud claim, the insurance company asserted that an oral side agreement to a written policy violated the statute prohibiting the making of "any contract of insurance or agreement as to such contract other than as plainly expressed in the policy." The State Supreme Court allowed the plaintiff to recover because the action was not on the contract but in tort for fraud and deceit, declaring "the statute was never intended to shield a fraud." 166 S.E.2d 268. In *Hood v. Life & Casualty Ins. Co.*, 173 S.C. 139, 175 S.E. 76 (1934), the court in *dicta* followed *Crosby*. *See also Aiken Petroleum Co. v. National Petroleum Underwriters, etc.*, 207 S.C. 236, 36 S.E.2d 380 (1945).

There are exceptions to the general rule that courts will not aid a party to an unenforceable contract. The Restatement of Contracts, which South Carolina has adopted in other particulars,[3] recognizes the right of an injured

[3] *Player v. Chandler*, 299 S.C. 101, 382 S.E.2d 891 (1989) (statute of frauds); *Moody v. McLellan*, 295 S.Ct. 157, 367 S.E.2d 419 (App.1988) (construction of contracts); *Ellis v. Smith Grading and*

party to recover in some circumstances despite legislation which makes a contract unenforceable. A breach of contract claim can be maintained for a contract declared unenforceable by statute where the promisee is excusably ignorant of legislation of a minor character.[4] Similarly, restitution is available in favor of a party who is excusably ignorant of such legislation or is not equally in the wrong.[5] The anti-rebate statute constitutes legislation of a specialized or technical nature with which those in the

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Paving, Inc., 294 S.C. 470, 366 S.E.2d 12 (App.1988) (restitution); *Riedman Corp. v. Jarosh*, 289 S.C. 191, 345 S.E.2d 732 (App.1986) (convenant not to compete); *King v. Oxford*, 282 S.C. 307, 318 S.E.2d 125 (App.1984) (requirement of certainty in contracts); *Pingley v. Brunson*, 272 S.C. 421, 252 S.E.2d 560 (1979) (specific performance).

[4] Restatement (Second) of Contracts (1979), § 180:

Effect of Excusable Ignorance.

If a promisee is excusably ignorant of facts or of legislation of a minor character, of which the promisor is not excusably ignorant and in the absence of which the promise would be enforceable, the promisee has a claim for damages for its breach but cannot recover damages for anything that he has done after he learns of the facts or legislation.

Comment a explains:

". . . Such ignorance is more likely to be excusable where the legislation is of a local, specialized or technical nature and where the other party may be assumed to have knowledge as to such matters. In determining whether ignorance of fact or law is excusable, any misrepresentations made by the other party are relevant. . . ."

Comment b adds:

". . . If the promisor has specialized knowledge of the field involved, he is likely to be charged with knowledge as to legislation of even a minor character. It is not necessary that the promisor make any misrepresentation, although a misrepresentation by him may be significant as bearing on whether the promisee's ignorance is excusable. . . ."

[5] Restatement (Second) of Contracts (1979), § 198.

insurance business would be expected to be familiar while lay people normally would not. The evidence in this action indicates the insurance agents were aware that their promise was unenforceable and that Defender's officers did not know of the statute. This seems to be a case, then, where the Court should not apply a rigid rule forbidding relief.

Northwestern relies on two Oregon decisions involving an almost identical statute.[6] Those cases advocate that a rigid rule precluding reliance on a promise forbidden by statute encourages compliance with the law. "When purchasers of insurance are aware that if they have entered into insurance contracts in violation of the statutes, the courts of Oregon will refuse to come to their aid if the insurer asserts a defense of illegality, we believe that they will avoid this sort of contract in the future." *Mountain Fir Lumber Co., Inc. v. Employee Benefits Ins. Co.*, 679 P.2d 296, 300 (1984). With respect, the Court rejects the Oregon courts' conclusion, which appears to be one that only that jurisdiction has reached, as a fond hope. It is unrealistic to expect that the public will eventually learn that the statute exists. The statute, or predecessor legislation that was very similar, has been a part of South Carolina statutory law for almost a century yet it is doubt-

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[6] *Stuckart Lumber Co. v. Employee Benefit Ins. Co., Inc.*, 555 F.Supp. 22 (D.Ore.1982), involved an insurer's illegal and unenforceable promise to return insurance premiums paid in excess of an agreed formula. The court held that there is no right to rely on an illegal promise, declaring that such a rigid rule encourages compliance with the law. In *Mountain Fir Lumber Co. v. Employee Benefits Ins. Co.*, 296 Or. 639, 679 P.2d 296 (1984), after holding an oral premium rebate agreement unenforceable because it was not set forth in the written workers' compensation policy as required by statute, the court further concluded that the insured could not maintain its fraud action because it had no right to rely on a promise forbidden by statute. The holding is partially based on the court's determination that the Oregon legislature intended to prohibit competitive rates for unemployment insurance.

ful that many people outside the insurance industry are aware of its provisions.

South Carolina courts would more likely conclude that mere constructive knowledge of a statute would not as a matter of law preclude reliance on a fraudulent representation. In *Reid v. Harbison Dev. Corp.*, 285 S.C. 557, 330 S.E.2d 532 (App.1985), a decision involving a developer's fraudulent nondisclosure of a restrictive covenant, the court declared "[t]he person committing the fraud cannot defeat a claim for misrepresentation simply because the person defrauded is charged with notice under a recording statute [citations omitted], particularly where the misrepresented facts are peculiarly within the representor's knowledge." *Id.*, 330 S.E.2d at 534. The case supports the conclusion that, for the purpose of determining a right to rely on a fraudulent assertion, the issue of constructive notice should not be decided as a matter of law but instead depends on the facts. "Because the jury inferentially found that the Reids acted reasonably, the law does not charge them with constructive notice in this instance." *Id.*, 330 S.E.2d at 535. Several South Carolina decisions indicate that the "right to rely" element of a fraud claim is to be determined by the trier of facts based on the circumstances of each case.[7]

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[7] "Issues of reliance and its reasonableness, going as they do to subjective states of mind and applications of objective standards of reasonableness, are preeminently factual issues for the triers of the facts." *Starkey v. Bell*, 281 S.C. 308, 315 S.E.2d 153, 156 (App.1984), citing *Miller v. Premier Corp.*, 608 F.2d 973 (4th Cir.1979) (applying South Carolina law). The right to rely depends on "the various circumstances involved, such as the form and materiality of the representations, the respective intelligence, experience, age, and mental and physical condition of the parties, and the relation and respective knowledge and means of knowledge of the parties." *Giles v. Lanford & Gibson, Inc.*, 285 S.C. 285, 328 S.E.2d 916, 918 (App.1985); *Thomas v. American Workmen*, 197 S.C. 178, 182, 14 S.E.2d 886, 888 (1941).

There is additional authority for allowing recovery on a fraud claim in these circumstances. Courts in other jurisdictions have held that a defendant in a fraud action cannot assert as a defense that the transaction induced by the fraud was illegal or against public policy.[8] Other jurisdictions have also held that whether a contract is legally enforceable or not is immaterial on the question of fraud,[9] and if a party to an illegal contract has been defrauded, he may have his action in fraud although he could not enforce the contract.[10] Such reasoning is in accord with the South Carolina decisions which distinguish between fraud and contract causes of action on contracts forbidden by the statute.[11]

The relative culpability of the parties is an additional factor in determining whether or not to allow recovery for fraud on an illegal promise. Courts have entertained lawsuits growing out of an illegal transaction where the parties were not *in pari delicto*, especially where the illegality of the contract depended on the existence of peculiar facts which were known to the defendant but

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[8] *Bassett v. Bassett*, 590 S.W.2d 531 (Tex.Civ.App. 1 Dist.1979) (in action to cancel a deed for fraud, former wife could not defend on ground that transaction induced by her fraudulent promise was illegal or against public policy); *Gaines v. Wolcott*, 119 Ga.App. 313, 167 S.E.2d 366 (1969) (although patient and doctor were *in pari delicto*, patient could recover damages for injuries caused by doctor's negligent performance of illegal abortion); *A.M. Kidder & Co. v. Clement A. Evans & Co.*, 111 Ga.App. 484, 142 S.E.2d 269 (1965) (broker's non-willful violation of Federal Reserve Board regulation did not preclude his recovering for fraud).

[9] *R.D. Reeder Lathing Co. v. Cypress Ins. Co.*, 3 Cal.App.3d 995, 84 Cal.Rptr. 98 (1970); *Dillion v. Sumner*, 153 Cal.App.2d 639, 315 P.2d 84 (1957).

[10] *Symcox v. Zuk*, 34 Cal.Rptr. 462, 221 Cal.App.2d 383 (1963).

[11] *Crosby v. Metropolitan Life Ins. Co.*, 167 S.C. 255, 166 S.E. 266 (1932); *see also Hood v. Life & Casualty Ins. Co.*, 173 S.C. 139, 175 S.E. 76 (1934) and *Aiken Petroleum Co. v. National Petroleum Underwriters, etc.*, 207 S.C. 236, 36 S.E.2d 380 (1945).

unknown to the plaintiff, and the plaintiff had no intention of violating the law.[12] Such is the case here where the evidence indicates that the insurance agents knew the rebate provision was unenforceable and that Defender's officers were unaware of the statute or the illegality of the promise and had no intention to break the law.

It is clear from the foregoing discussion that there are circumstances under which the public interest would be subserved by granting rather than denying relief to a party to an illegal contract.[13] The circumstances here present such a scenario. The anti-rebate statute is a regulatory statute designed to prohibit insurers from offering discriminatory rates to members of the same class of insureds and to promote open, fair dealings between insurance companies and their customers. In this case an insurance company has misled an insured as to the enforceability of the terms of the coverage. Imposing liability for fraud on an insurer whose agents have knowingly offered prohibited rebates would serve rather than frustrate the purposes of the statute.

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[12] *Oakes v. Guarantee Ins. Co.*, 573 S.W.2d 899 (Tex.Civ.App. 1978).

[13] In *White v. Commercial & Farmers' Bank*, 66 S.Ct. 491, 45 S.E. 94 (1903), the court reasoned that to further justice, recovery of property transferred under an illegal contract would be allowed. In *In re Leasing Consultants Inc.*, 592 F.2d 103 (1979), the court allowed recovery of payments made to a law firm which received such payments in violation of a federal conflict of interest statute because recovery enforced a public policy forbidding the illegal contract and benefitted those who were blameless. In *Enlow & Son, Inc. v. Higgerson*, 201 Va. 780, 113 S.E.2d 855 (1960), where a defendant subcontractor in a breach of contract action defended on the ground the contract was illegal because he was unlicensed at the time of contracting, the court concluded "to deny relief to a licensed contractor who has entered into a contract with an unlicensed contractor will not further the purposes of the statute but will benefit the primary wrongdoer." 113 S.E.2d at 860.

Accordingly, the Court concludes that the anti-rebate statute [14] does not as a matter of law preclude the plaintiff's right to rely on Northwestern's agents' fraudulent misrepresentation.

III.

Northwestern next contends that the jury improperly measured actual damages by awarding an amount totaling all premiums paid. It argues that, because the alleged promise was to rebate the difference between the premiums paid on a policy of $8 Million and those payable on a lower amount of coverage, Defender is entitled to recover only $13,314.22, or the difference between premiums for the initial $8 Million coverage and the $7 Million coverage Defender requested nine months later. Northwestern argues that Defender received the benefit of the full $8 Million life insurance coverage during the period the policy was in force and it would thus be inequitable to permit Defender to recover all premiums paid. The Court disagrees. There was sufficient evidence presented at trial from which the jury could have concluded that but for the fraudulent promise to rebate premiums, Defender would not have then purchased the Northwestern policy. The jury's award is consistent with such a conclusion.[15]

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[14] The defendant also relies on Code Sections 38-57-120 and 38-57-130(3), which similarly proscribe premium rebates. Although the defendant did not expressly rely on these statutes at the directed verdict stage, the Court has considered them together with section 38-55-50. The ruling, and the grounds therefor, on section 38-55-50 apply to sections 38-57-120 and 38-57-130(3) as well.

[15] The evidence arguably supports a cause of action for fraudulent inducement to enter a contract. *See Darby v. Waterboggan of Myrtle Beach, Inc.*, 288 S.C. 579, 344 S.E.2d 153 (Ct.App.1986). If Defender had brought such a cause of action, it could have been returned to the *status quo ante*; that is, it could have recovered the consideration it paid plus any foreseeable incidental damages incurred in reliance on the fraudulent misrepresentation. *See Carrigg v. Blue*, 283 S.C. 494, 323 S.E.2d 787 (App.1984); *Baeza v. Robert E. Lee Chrysler, Plymouth, Dodge, Inc.*, 279 S.C. 468, 309 S.E.2d 763 (App.1983).

IV.

Northwestern next argues for judgment n.o.v. on the ground that the $5,000,000 punitive damages award is clearly excessive and the result of passion, caprice or prejudice on the part of the jury. The Court agrees.

In a diversity action, state substantive law determines the circumstances justifying punitive damages. Federal law governs review of the jury award. *Shamblin's Ready Mix, Inc. v. Eaton Corp.*, 873 F.2d 736, 738 (4th Cir. 1989). The court can reduce an excessive verdict and enter judgment for an appropriate amount of punitive damages to remedy the wrong committed by the defendant without requiring a new trial. This procedure permits the court to take into account all of the circumstances justifying punishment and deterrence. *Id.* at 743.

In South Carolina, punitive damages are recoverable if a defendant acts recklessly, willfully or wantonly. *Camp v. Components, Inc.*, 285 S.C. 443, 330 S.E.2d 315 (Ct. App.1985); *Fox v. Munnerlyn*, 283 S.C. 490, 323 S.E.2d 68 (Ct.App.1984). The Court first concludes there is sufficient evidence from which the jury could have found that Northwestern's agents acted recklessly, willfully and wantonly in promising the premium rebate. Following Defender's demand and Northwestern's refusal to rebate, Jack Caroway, a former Northwestern agent, informed Donald J. Schuenke, Northwestern's president, by letter that he and other agents had intentionally misrepresented to Defender that there would be no "loss of premium" should Defender decide to reduce coverage at a later date. This misrepresentation was made because the agents believed that Defender was unwilling to purchase the policy at that time without the assurance of a rebate. They were eager to make the sale and hoped that Defender would not request a reduction in coverage after purchasing the policy. Whether or not the promise would or could be honored later if Defender sought reduced coverage was irrele-

vant to them. This conduct manifests recklessness, willfulness and wantonness.

Once punitive damages are deemed to be proper, the amount to be assessed depends on the character of the wrong committed, the punishment that should be applied and the ability of the defendant to pay. *Mylin v. Allen-White Pontiac, Inc.*, 281 S.C. 174, 314 S.E.2d 354 (App. 1984). An excessive verdict, however, must be set aside if the court "is of the opinion that the verdict is against the clear weight of the evidence, or is based on evidence which is false, or will result in a miscarriage of justice." *Johnson v. Parrish,* 827 F.2d 988, 991 (4th Cir.1987).

Considering the circumstances, the Court concludes that the $5,000,000 punitive damages award is not justified and must be set aside. Several factors lead to the conclusion that the award, almost 50 times greater than the actual damages award, is so grossly inflated as to constitute a miscarriage of justice. *See Johnson,* 827 F.2d at 991. First, the harm Defender suffered did not involve personal injury or property damage but only a loss of approximately $110,000 by a company with estimated annual gross sales of approximately $35 Million.[16] Next there was no evidence presented that the agents' actions constitute Northwestern's business practice or that Northwestern knew of or condoned fraudulent practices by its agents; to the contrary, the evidence indicates that Northwestern penalizes its agents for their errors and omissions by reclaiming commissions and seeking indemnification. This case appears to be an isolated incident created by overzealous agents which is not likely to be repeated.[17]

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[16] This figure is based on the testimony of Hollis Cone, Defender's president, who estimated that the company's $2 to $3 Million in annual sales to Springs Mills represents six or seven percent of Defender's total annual sales.

[17] The penalties imposed by various regulatory statutes which prohibit, among other things, an insurance agent's promising a discriminatory rebate, serve as an additional deterrent to any repeti-

Moreover, the sophistication and education of Defender's officers makes it unjust for the Court to allow the plaintiff to be rewarded with such a punitive damages windfall. Indeed, Bill Mitchum, Defender's financial officer who attended law school for five quarters and was privy to the negotiations between Defender and Northwestern's agents, testified he found it hard to believe Northwestern would actually rebate the premium if coverage were subsequently reduced.

Under the circumstances, the Court concludes that a punitive damages award of Ten Thousand ($10,000) Dollars, when coupled with the recovery of all premiums paid in reliance on the fraudulent promise, is sufficient to serve the purposes of punishment, deterrence and vindication of the plaintiff's rights. Although this amount is insubstantial when viewed in light of the defendant's ability to pay, the Court is convinced "it is sufficient to punish the company for its vicarious liability and to deter future misconduct by relatively low ranking employees." *Shamblin's Ready Mix*, 873 F.2d at 743.[18]

Northwestern finally argues that the excessive punitive damages award violates due process. Because the Court has ruled that the punitive damages award is clearly excessive and cannot stand, it declines to decide whether it also violates due process.

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tion of the conduct here. *See, e.g.*, S.C. Code Ann. §§ 38-2-10 and 38-55-60 (1976, as amended). Because punitive damages have been deemed to serve the same purpose as civil penalties, *Shamblin's Ready Mix*, 873 F.2d at 741-42, *citing Tull v. United States*, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987), the need to resort to punitive damages alone as a means to stop certain conduct decreases when civil penalties are also available.

[18] As is noted in *Shamblin's Ready Mix*, the imposition of punitive damages vicariously has been criticized as inconsistent with the deterrence goal of punitive damages because it punishes "not based on opprobrious conduct but on the mere legal relationship between the offending individual and the employer." 873 F.2d at 743 n. 4.

In accordance with Federal Rule of Civil Procedure 50(c), the Court conditionally grants the defendant's motion for a new trial solely on the issue of punitive damages should the judgment n.o.v. be vacated or reversed on appeal. The Court has discretion to grant a new trial if the size of the verdict is either excessive or against the clear weight of the evidence. *Virginian Ry. Co. v. Armentrout,* 166 F.2d 400 (4th Cir.1948). Accordingly, the Court conditionally grants the motion for a new trial on the ground that the jury's punitive damages verdict of $5,000,000 is so excessive as to represent whim or caprice on the jury's part. *See Martin v. Fleissner GMBH,* 741 F.2d 61, 65 (4th Cir.1984).

V.

Defender's motion is for an award of prejudgment interest. Northwestern has not filed any opposition to the motion. Under South Carolina law, an award of prejudgment interest is proper only if a claim is liquidated. *Llewelyn v. Dobson Bros.*, 274 S.C. 177, 262 S.E.2d 726 (1980). A claim is liquidated if the sum claimed is certain or capable of being reduced to a certainty. *Dibble v. Sumter Ice & Fuel Co.*, 283 S.C. 278, 322 S.E.2d 674 (App. 1984). The Court may award prejudgment interest on a liability to pay money from the time when, either by operation of law or by agreement of the parties, the payment was demandable, if the sum is certain. *Southern Welding Works, Inc. v. K & S Construction Co.*, 286 S.C. 158, 332 S.E.2d 102 (Ct.App.1985). The plaintiff's complaint alleges that Defender would not have purchased the policy but for the fraudulent promise of Northwestern agents to rebate premiums.[19] By letter dated March 25, 1987, Defender's president requested the refund of all premiums paid, a sum certain totalling One

[19] For fraudulent inducement to enter a contract, the purchaser may elect to recover the consideration paid. *Carrigg v. Blue,* 283 S.C. 494, 323 S.E.2d 787 (App.1984).

Hundred Six Thousand, Five Hundred Thirteen and 74/100 ($106,513.74) Dollars. This is the precise amount the jury awarded as actual damages. Defender is thus entitled to prejudgment interest on this amount at the statutory rate of 8¾ percent per annum computed from March 25, 1987, the date it made the premium refund demand. *See* S.C.Code Ann. § 34-31-20 (1976, as amended).

Accordingly, the Court sets aside the jury's punitive damages verdict and directs that judgment be entered for the plaintiff in the amount of Ten Thousand ($10,000) Dollars in punitive damages. In addition, the Court conditionally grants the defendant's motion for a new trial on the sole issue of punitive damages pursuant to Federal Rule of Civil Procedure 50(c). The defendant's remaining motions are denied. Finally, the plaintiff's motion for prejudgment interest is granted.

IT IS SO ORDEDED.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 90-2006, 90-2007

DEFENDER INDUSTRIES INCORPORATED,
Plaintiff-Appellant,

and

KATHRYN G. INABINET,
Plaintiff,

v.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
Defendant-Appellee.

DEFENDER INDUSTRIES, INCORPORATED,
Plaintiff-Appellee,

and

KATHRYN G. INABINET,
Plaintiff,

v.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
Defendant-Appellant.

Argued June 4, 1991.

Decided July 9, 1991.

Before ERVIN, Chief Judge, and WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE and WILKINS, Circuit Judges.

OPINION

WILKINS, Circuit Judge:

A jury returned a verdict in favor of Defender Industries, Incorporated, awarding it actual and punitive damages in a fraud action against Northwestern Mutual Life Insurance Company. Finding that the jury properly awarded punitive damages but was excessive in the amount of its award, the district court granted a motion by Northwestern for judgment notwithstanding the verdict as to the amount of the punitive damages and reduced the amount from $5,000,000 to $10,000. *Defender Indus., Inc. v. Northwestern Mut. Life Ins. Co.*, 727 F. Supp. 252, 260 (D.S.C. 1989). Alternatively, the district court ruled that in the event it committed error in granting the judgment n.o.v. it granted a new trial as to the amount of punitive damages. *Id.* After oral argument before a panel, rehearing was ordered before this court sitting en banc. Because we find the district court did err, we remand for proceedings consistent with this opinion.

I.

In late 1985 Defender began investigating the life insurance market with a view toward replacing a five million dollar life insurance policy then in place on the life of the chairperson of its board of directors and principal shareholder, Kathryn G. Inabinet, with a policy of a greater amount. In response to a general inquiry, agents from Northwestern began to solicit the Defender account and utimately the parties entered into negotiations over the terms of a policy.

Defender desired to obtain a life insurance policy to offset anticipated estate tax liability that would become due at Inabinet's death. Defender retained professional

assistance to value its stock in order to make an informed decision about the estimated amount of estate tax liability. Although Defender had not yet received the stock valuation when negotiations with Northwestern began, and therefore was not yet confident of the amount of insurance coverage it would require, Defender estimated that it needed between five and eight million dollars of coverage.

Defender wanted to have a new policy in place prior to the effective date of a new federal tax law affording less favorable tax treatment to insurance contracts entered into subsequent to the effective date. Northwestern agents were also anxious to close the deal because the sale of the policy would produce large commissions for them. As an inducement to Defender to purchase a policy from Northwestern, its agents represented that if Defender purchased the maximum amount of insurance coverage it anticipated it might need, Northwestern would permit Defender to reduce the coverage amount if, following receipt of the stock valuation, Defender determined that its actual insurance requirements were less. Northwestern agents explained that Northwestern would refund any excess premiums which resulted from such a reduction or would credit them toward future premiums. With this understanding, Defender purchased a policy for eight million dollars of coverage. Northwestern maintained possession of the policy and did not deliver it to Defender until after the dispute precipitating this lawsuit arose.

Some months after purchase of the policy, Defender determined that it actually required seven million dollars of coverage and sought to reduce the policy to this amount. Northwestern refused to reform the policy as promised. A Northwestern agent also threatened Defender with the loss of one of its largest customers over whom a Northwestern agent, through family connections, exercised some measure of influence in the event Defender should cancel the policy. Defender wrote to the chief executive

officer (CEO) of Northwestern complaining of the misrepresentation and threat. Despite the fact that one of the Northwestern agents involved wrote to the CEO admitting that the conduct about which Defender complained had in fact occurred, the CEO wrote to Defender stating that an investigation had disclosed no reason to reduce the policy or discipline its agents. One reasonable interpretation of interoffice correspondence between high-ranking Northwestern officials would allow the conclusion that the upper echelons in the company were aware of the agents' misconduct and attempted to conceal it.

Defender permitted the policy to lapse and brought this action alleging breach of contract, breach of contract accompanied by a fraudulent act, fraud, constructive fraud, and negligence arising out of the misrepresentations and fraudulent statements made by the Northwestern agents in inducing Defender to purchase the policy. At the conclusion of all the evidence, the district court granted a motion by Northwestern for a directed verdict on the breach of contract, breach of contract accompanied by a fraudulent act, and negligence causes of action, reasoning that a South Carolina statute prohibited the type of agreement that Defender alleged the parties had entered. The district court denied a motion by Northwestern for a directed verdict on the fraud and constructive fraud allegations, ruling that the statute did not shield these two causes of action. Additionally, the district court denied a motion by Northwestern for a directed verdict on punitive damages.

The case was submitted to a jury which returned an actual damage award of $106,513.74, the exact amount Defender paid in premiums during the nine months the policy was in effect. The jury also returned a punitive damage award of $5,000,000 that was reduced to $10,000 by the district court.

II.

A.

In a diversity case, state substantive law governs the circumstances justifying an award and the amount of punitive damages, and federal law governs district and appellate court review of the jury award. *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278-79, 109 S.Ct. 2909, 2922-23, 106 L.Ed.2d 219 (1989). In federal practice a "judgment n.o.v. should not be granted 'if there was any evidence in the case that would authorize a verdict for the plaintiff.'" *Warner v. Billups E. Petroleum Co.*, 406 F.2d 1058, 1059 (4th Cir. 1969) (quoting *Tedder v. Merchants & Mfrs. Ins. Co. of N.Y.*, 251 F.2d 250, 254 (4th Cir.1958)). This court reviews the grant of a judgment n.o.v. to determine if, viewing the evidence in the light most favorable to the party opposing the motion, a jury could reasonably find in favor of that party. *United States v. Tobias*, 899 F.2d 1375, 1378 (4th Cir.1990). The district court properly concluded that the imposition of punitive damages in some amount was justified under South Carolina law based upon evidence in the record that Northwestern agents acted recklessly, willfully, or wantonly, *see, e.g., Camp v. Components, Inc.*, 285 S.C. 443, 330 S.E.2d 315 (Ct.App.1985), in "intentionally misrepresent[ing] to Defender that there would be no 'loss of premium' should Defender decide to reduce coverage at a later date." 727 F.Supp. at 259

B.

Although deciding that the imposition of some amount of punitive damages was proper, the district court concluded that the jury award of $5,000,000 was "so grossly inflated as to constitute a miscarriage of justice." 727 F.Supp. at 260. Under traditional procedure, a district court, faced with what it believed to be an excessive damage award by a jury in a diversity case on a common-law

cause of action, could set aside the excessive verdict by granting a new trial or a new trial *nisi* remittitur. *See Browning-Ferris,* 492 U.S. at 278-79, 109 S.Ct. at 2922-23; *see generally,* 11 C. Wright, A. Miller, & F. Elliott, *Federal Practice and Procedure* § 2815 (1973 & Supp. 1991 (hereinafter Wright & Miller). The district court did not follow this established procedure by ordering a new trial *nisi* remittitur to the amount of $10,000. Instead, the court exercised authority granted by this court in *Shamblin's Ready Mix, Inc. v. Eaton Corp.,* 873 F.2d 736, 743 (4th Cir.1989) and ordered that judgment be entered in the amount of $10,000.

Shamblin's involved a relatively insignificant tortious conversion but ultimately presented this court with an exceptional set of circumstances. In the first trial of *Shamblin's* a jury awarded punitive damages in the amount of $600,000. This court remanded for a new trial because the punitive damage award was tainted by plaintiff's improper and highly prejudicial closing argument. During the second trial, plaintiff committed similar errors, and the jury awarded $650,000 in punitive damages. Rather than remand for yet a third trial to assess the amount of punitive damages, the panel held that the seventh amendment does not entitle a plaintiff to a jury determination of the amount of punitive damages and ordered judgment entered in the amount of $60,000 for punitive damages.

A court has the inherent power to put an end to civil litigation in the interests of fairness and judicial economy when, by its conduct, one of the parties has, in effect, waived its right to a jury determination. This court, however, went much further in *Shamblin's.* Our holding meant that a jury determination of the amount of punitive damages in a diversity case on a state common-law cause of action is only advisory. Indeed, under *Shamblin's* a district court, having submitted the question of *liability* for punitive damages to the jury, could elect to withhold

the determination of an appropriate amount from the jury altogether. In the event the jury returned a verdict in favor of the plaintiff on the issue of liability for punitive damages, the district court could enter judgment for an amount the court considered appropriate.

The court in *Shamblin's* based its seventh amendment decision in large measure on *Tull v. United States*, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987). The *Tull* Court addressed whether the seventh amendment guaranteed jury determinations of liability under a federal statute, the Clean Water Act, and of the amount of civil penalties that would be imposed under the Act. The Court found that liability under the Clean Water Act must be determined by a jury but that Congress' *delegation* of the assessment of the amount of the civil penalties to the district court did not offend the seventh amendment. The Court reasoned that "[s]ince Congress itself may fix the civil penalties, it may delegate that determination to trial judges." 481 U.S. at 427, 107 S.Ct. at 1840.

The panel in *Shamblin's* read *Tull* as holding "that because determination of a remedy in a civil trial is not an essential function of a jury trial the seventh amendment did not require a jury trial for the determination of the civil penalty." 873 F.2d at 741. The panel reasoned that punitive damages are similar to civil penalties and, therefore, a determination of the appropriate amount is not a fundamental element of a jury trial. While *Tull* does contain some rather broad language, the Court was deciding only the issue of whether the determination of the amount of a civil penalty imposed for violation of a federal statute could be delegated to the trial judge without the necessity of a jury determination. The *Tull* decision cannot stand for the proposition that a plaintiff bringing a state common-law cause of action does not have a right to a jury determination of the amount of punitive damages. *See Tull*, 481 U.S. at 428, 107 S.Ct. at 1841 (Scalia, J., concurring in part and dissenting in

part) ("Even punitive damages are assessed by the jury. . . . ."). Rather, the *Tull* Court reasoned that the seventh amendment does not require that a jury determine the remedy in a civil trial unless such a determination is "necessary to preserve the 'substance of the common-law right of trial by jury.'" 481 U.S. at 426, 107 S.Ct. at 1840 (quoting *Colgrove v. Battin*, 413 U.S. 149, 157, 93 S.Ct. 2448, 2453, 37 L.Ed.2d 522 (1973)).

Over one hundred years ago the Supreme Court held that the seventh amendment guarantees a jury determination of the amount of tort damages. *Kennon v. Gilmer*, 131 U.S. 22, 9 S.Ct. 696, 33 L.Ed. 110 (1889). Moreover, the Supreme Court decisions in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989), and *Pacific Mutual Life Insurance Company v. Haslip*, —— U.S. ——, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), decided after *Shamblin's*, emphasize the fundamental character of a jury assessment of the amount of punitive damages. Although the *Browning-Ferris* decision principally addressed the application of the eighth amendment to punitive damages, petitioners had also argued that the amount of punitive damages awarded by the jury was excessive as a matter of federal common law. In discussing proper appellate review of the excessiveness of a punitive damage jury award, the Court stated:

> It is not our role to review directly the award for excessiveness, or to substitute our judgment for that of the jury. Rather, our only inquiry is whether the Court of Appeals erred in finding that the District Court did not abuse its discretion in refusing to grant petitioners' motion, under Federal Rule of Civil Procedure 59, for a new trial or remittitur. . . .
>
> . . . . In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may

> consider in determining their amount, are questions of state law. . . .
>
> In reviewing an award of punitive damages, the role of the District Court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. The Court of Appeals should then review the District Court's determination under an abuse-of-discretion standard.

492 U.S. at 278-79, 109 S.Ct. at 2922-23. Additionally, the Court recognized that it has never explicitly ruled upon whether an appellate court may, consistent with the seventh amendment, review a refusal by a district court to set aside a jury award as excessive. *See id.* at 279 n. 25, 109 S.Ct. at 2922 n. 25; *see also* Wright & Miller § 2820.

In *Haslip*, the Court reiterated the fundamental and historical role of the jury in the assessment of punitive damages. 111 S.Ct. at 1041-43. The Court noted:

> Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.

Id. at 1042.

Several other circuits have, upon finding a punitive damage jury award excessive, ordered it reduced to a sum certain, *see Shamblin's*, 873 F.2d at 740-41; however, these decisions did not address the constitutional right to a jury trial. Indeed, in these cases the appellate court reduced the verdicts without any explanation or discussion of their authority to do so. On the other hand, the two Courts of Appeals that have considered whether a

district court may reduce the amount of punitive damages awarded by a jury and enter judgment in that amount without providing a plaintiff an opportunity to accept a remittitur or receive a new trial have concluded that the right to a jury determination of the amount of punitive damages is guaranteed by the seventh amendment. *See O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438, 1447-48 (10th Cir.1987), *cert. denied*, 486 U.S. 1032, 108 S.Ct. 2014, 100 L.Ed.2d 601 (1988); *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1391-92 (7th Cir.1984).

An assement by a jury of the amount of punitive damages is an inherent and fundamental element of the common-law right to trial by jury. Therefore, we hold that the seventh amendment guarantees the right to a jury determination of the amount of punitive damages, and overrule *Shamblin's Ready Mix, Inc. v. Eaton Corp.*, 873 F.2d 736 (4th Cir.1989). Because the district court acted under the authority of *Shamblin's*, we reverse the grant of judgment n.o.v. on the amount of punitive damages.

III.

The district court conditionally granted a motion by Northwestern for a new trial on the issue of the amount of punitive damages in the event the grant of judgment n.o.v. was vacated or reversed.[1] *See* Fed.R.Civ.P. 50(c). In ruling on a motion for a new trial

> "[i]n federal practice, it is the duty of the district judge to set aside an excessive verdict even when such a verdict is supported by substantial evidence 'if he is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice'."

[1] On remand the district court may wish to consider the appropriateness of granting a new trial *nisi* remittitur.

Johnson v. Parrish, 827 F.2d 988, 991 (4th Cir.1987) (quoting *Aetna Casualty & Sur. Co. v. Yeatts*, 122 F.2d 350, 352 (4th Cir.1941)). We review the decision of the district court to grant a new trial merely for an abuse of discretion. *Browning-Ferris*, 492 U.S. at 279, 109 S.Ct. at 2922.

As noted above, the district court found the punitive damages verdict was so excessive as to constitute a miscarriage of pustice. We cannot say that the grant of a new trial on the issue of the amount of punitive damages constituted an abuse of discretion. Whether we agree with the ruling of the district court is not at issue here, for we are constrained by the proper exercise of appellate review to affirm its decision.

IV.

At the close of all the evidence, Northwestern moved for a directed verdict on all causes of action contending that a South Carolina statute barred suit by Defender because it rendered illegal and unenforceable the promise upon which Defender based its suit. S.C.Code Ann. § 38-55-50 (Law.Co-op.1989 & Supp.1990). Defender argued that Northwestern had waived any defense of illegality to which it might otherwise have been entitled because it had failed to plead this affirmative defense. The district court then granted Northwestern's motion to amend its answer to assert illegality as a defense. Defender appeals this ruling.

A district court is to freely grant leave to amend " 'when justice so requires' " absent a compelling reason not to permit the amendment. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962) (quoting Fed.R.Civ.P. 15(a). Mere delay, when unaccompanied by actual prejudice, bad faith, or futility, does not justify a denial of leave to amend. *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509-10 (4th Cir.1986).

Although the motion to amend by Northwestern was made after the close of the evidence, Defender was unable to show any prejudice, for the record discloses that Defender was aware prior to trial that Northwestern intended to raise this defense. Additionally, Defender does not contend that it would or could have offered additional evidence to oppose this defense had the motion been made earlier. We find no abuse of the discretion vested in the district court.

V.

Section 38-55-50 of the Code of Laws of South Carolina prohibits discrimination by an insurance company among insureds by *inter alia* prohibiting insurance agents from making a policy of insurance "other than as plainly expressed in the policy issued" and from paying "as inducement to the taking of insurance any rebate of premium payable on the policy." S.C.Code Ann. § 38-55-50. The district court found that this section foreclosed causes of action sounding in breach of contract and breach of contract accompanied by a fraudulent act.[2] Since, as the district court interpreted it, the promise alleged by Defender was one for Northwestern to rebate policy premiums, the promise was unenforceable as against public policy because it violated the statute.

The district court concluded, however, that the statute did not preclude recovery on the fraud cause of action. Northwestern argues that the district court erred in concluding that the "anti-rebate" statute does not negate a right by Defender to rely on the promise—one of the elements Defender must prove in order to establish its fraud claim. *See First State Sav. & Loan v. Phelps*, 299 S.C. 441, 385 S.E.2d 821 (1989). We find persuasive the reasoning of the district court, 727 F.Supp. at 255-58, and affirm.

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[2] Defender appeals this ruling. We need not reach the issue for Defender was awarded all of its alleged actual damages on its fraud cause of action.

VI.

Northwestern argues that the jury's award of the entire amount of the premiums paid by Defender for the Northwestern policy as actual damages was error. We find, as did the district court, that the jury could have properly concluded, based upon the evidence in the record, that but for the fraudulent representation by Northwestern concerning the policy, Defender would not have purchased the policy, and consequently it was injured in the amount of the premiums it paid. *Daniels v. Coleman*, 253 S.C. 218, 169 S.E.2d 593 (1969) (party injured by fraud entitled to receive as damages an amount that will put him in same position as if he had not been defrauded).

VII.

For the foregoing reasons, we reverse the grant of judgment n.o.v. as to the amount of punitive damages and affirm the order of the district court in all other respects.[3] Accordingly, we remand for proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

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[3] Northwestern belatedly attempted to raise a due process challenge to the South Carolina punitive damages scheme during the supplemental briefing following argument of the case before a panel of this court. We decline to address this issue, as Northwestern has failed to pursue it in a timely manner.

Supreme Court, U.S.
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No. 92-1708

IN THE

Supreme Court of the United States

October Term, 1992

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

DEFENDER INDUSTRIES, INC., ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Petition for Certiorari filed by Northwestern Mutual Life Insurance Company ("Northwestern") is an ill-disguised attempt to use the pendency of *TXO Production Corp v. Alliance Resources, Inc.*, No. 92-479 (argued Mar. 31, 1993), to buy time and postpone the date on which the judgment in this case must be paid. The petition should not be granted or even held pending decision in that case; it should be denied outright.

To say that Northwestern has had its day in court is an understatement. Its arguments have been aired before *two* different juries, *two* different district courts, and the Fourth Circuit in *two* separate appeals. As much as Northwestern tries to reargue the case in its petition, the undeniable fact is that the courts below carefully considered all of these fact-based arguments and confirmed the juries' findings that Northwestern's conduct was fraudulent, reprehensible, and warranted punitive damages. Even so, the courts below fully protected Northwestern's interests by reducing the punitive damages it must ultimately pay by *four-fifths* — to $5 million from $25 million. Most litigants would applaud a system that has so obviously worked to their benefit. Not Northwestern.

In its first question presented, Northwestern takes issue with the very process of post-trial review that saved it $20 million. Northwestern contends that the district court should have taken account of a state-court decision, *Gamble v. Stevenson*, 406 S.E.2d 350 (S.C. 1991), as part of its analysis. But Northwestern fails to mention that the district court *did in fact* cite and apply *Gamble* in concluding that the punitive damages originally awarded by the jury were excessive and required a remittitur. Appendix to Petition for Certiorari ("Pet. App.") 29a-30a. Northwestern also fails to mention that it had argued to the district court that *Gamble* did *not* apply to this federal court case. Northwestern's post-trial strategy was hardly surprising, since the system of post-trial review in South Carolina is a highly deferential one that would have been far less favorable to Northwestern than the thoughtful, balanced review it actually received. But it certainly is surprising — as well as completely improper — for Northwestern now to take precisely

the opposite view and to urge that *Gamble* does in fact apply to its case. Northwestern's procedural due process claim is not properly presented and has no merit.

Northwestern's second question presented is equally unworthy of this Court's review. Northwestern complains that its award is "excessive," but proposes no standard — beyond an *ad hoc* "you-know-it-when-you-see-it" approach — by which punitive damages awards can be evaluated. Moreover, this case is hardly a suitable vehicle for the review of an excessiveness claim. Here, from the defendant's perspective, the system *worked*: Northwestern's liability was reduced by 80 percent, representing $20 million.

Northwestern complains that the award against it could be justified only on the basis of its wealth. This is flatly untrue. In fact, the district court explained that if wealth were the only consideration, it likely would have upheld the jury's original award of $25 million. Pet. App. 30a. The district court concluded: "In sum, the court is firmly convinced that a substantial punitive award against Northwestern is appropriate in this case." *Id.* at 28a. At two separate trials, Defender "demonstrated multi-tiered wrongdoing on the part of Northwestern and its agents. This wrongdoing included fraudulent conduct, threats of reprisal, and concealment. Additionally, the evidence was susceptible of the inference that high ranking Northwestern officials participated in the fraud." *Id.* The reprisal threatened by Northwestern, loss of Defender's largest customer, would have caused $2 million to $3 million dollars annually in harm to Defender. See pp. 4, 22-23, *infra*. Moreover, the legislatively prescribed penalty for Northwestern's misconduct was the loss of its license to do business in South Carolina, which would have cost Northwestern some $20 million per year in premium income. See p. 24-25 & note 25, *infra*. Given these factors, as well as the severity of Northwestern's conduct, a $5 million punitive damages award was hardly excessive.

STATEMENT OF THE CASE

Northwestern's Statement contains numerous errors and misstatements of fact and law. It also violates the most elementary canon of appellate practice that the evidence is to be construed in the light most favorable to the party opposing judgment as a matter of law — in this case, Defender Industries, Inc. ("Defender").[1]

In brief, the facts, as primarily reported by the Fourth Circuit (en banc) in the first appeal, are as follows:

(1) In late 1985 Defender began investigating the life insurance market to replace a $5 million life insurance policy in force on the life of the chairperson of the Board of Directors and the principal stockholder, Kathryn Inabinet Vickery. *Defender Industries, Inc. v. Northwestern Mutual Life Ins. Co.*, 938 F.2d 502, 503 (4th Cir. 1991) (en banc) ("*Defender*"); Pet. App. 55a. Northwestern agents began to solicit Defender and ultimately entered into negotiations over the terms of the policy. *Defender* at 503; Pet. App. 55a. At the time of the solicitation, Defender was uncertain as to the exact amount of insurance coverage required but estimated that it needed between $5 and $8 million of coverage. *Defender* at 504; Pet. App. 56a.[2] "As an inducement to Defender to purchase a policy from Northwestern, its agents represented that if Defender purchased the maximum amount of insurance coverage it anticipated it might need, Northwestern would permit Defender to reduce the coverage amount if, following receipt of the stock valuation, Defender determined that its actual insurance requirements were less."

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[1] Respondents Defender Industries, Inc., Kathryn Inabinet Vickery and the Kathryn Inabinet Vickery Marital Trust, are hereafter collectively referred to as "Defender." Defender Industries, Inc. is a South Carolina corporation and has no parent or subsidiary companies.

[2] Defender had retained professional assistance to value its stock in order to make an informed decision about the estimated amount of estate tax liability which would be due on Mrs. Vickery's death. At the time of the negotiations with Northwestern, Defender had not received the stock valuation. *Defender* at 503-04; Pet. App. 55a-56a.

Defender at 504; Pet. App. 56a. The Northwestern agents also explained that Northwestern would refund any excess premiums which resulted from such a reduction in the amount of the policy or it would credit them toward future premiums. *Defender* at 504; Pet. App. 56a. With this understanding, Defender purchased the Northwestern policy for the maximum amount of $8 million. *Defender* at 504; Pet. App. 56a.[3] Approximately seven months later when Defender determined it actually required $7 million of coverage and sought to reduce the policy to this amount, Northwestern refused to reform the policy as promised. *Defender* at 504; Pet. App. 56a. Defender also requested rescission of the policy, which Northwestern refused. Pet. App. 40a.

(2) Even more damaging, however, was the evidence the jury considered as part of its assessment of punitive damages that while the Northwestern policy was still in force a Northwestern agent "threatened Defender with the loss of one of its largest customers over whom a Northwestern agent, through family connections, exercised some measure of influence in the event Defender should cancel the policy." *Defender* at 504; Pet. App. 56a.[4] At the time of the threat in 1986, Defender employed approximately 300 workers at its customer's plant, J.A. 370:14-17; the district court (Anderson, J.) noted that "[t]his one customer generated revenues for Defender of *$2 million to $3 million per year*." Pet. App. 25a n.6 (emphasis added). (Northwestern's assertion in its petition that the compensatory damages awarded Defender of $106,513.74 "represents the most generous

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[3] The Fourth Circuit also noted another irregularity in the sale of the policy: "Northwestern maintained possession of the policy and did not deliver it to Defender until after the dispute precipitating this lawsuit arose." *Defender* at 504; Pet App. 56a. (A Northwestern agent wrote in an internal memorandum that an underwriter at Northwestern headquarters "related that our butts are on the line since the policy has not been delivered." J.A. 806.)

[4] A Defender executive considered the threat to be "extortion," J.A. 474:22-23, and an independent accountant who also heard the threat considered it "the same as blackmail." J.A. 336:23-24.

possible estimate of the injury that (Northwestern) *could* have inflicted through this tort," Petition for Certiorari ("Pet.") 2 (emphasis in original), is baseless on the record below.)

(3) After problems between Defender and Northwestern arose, a Northwestern agent wrote an internal memorandum saying:

> [T]he *Home Office's* position is becoming fairly clear that unless we were *malicious* in misrepresenting our product . . . , there doesn;t [sic] seem to be any basis for a refund. * * * It may come down to getting someone at Defender, . . . but the *Home Office* feels pretty strongly that they would like a letter signed that they [Defender] did see a Northwestern ledger and they can confirm that they did have all the facts pertaining to the case regarding the disclosure. It may be a good idea at this point of building some rapport back up out there to get that, but it may come down to that *if it gets real nasty*.

J.A. 812-13 (emphasis added). Thus, the *en banc* Fourth Circuit found: "One reasonable interpretation of interoffice correspondence between high-ranking Northwestern officials would allow the conclusion that the upper echelons in the company were aware of the agents' misconduct and attempted to conceal it." *Defender* at 504; Pet. App. 57a.

(4) After all of this incredible misconduct occurred, Defender's president flew from South Carolina to Cincinnati to meet with one of the Northwestern agents who had sold the policy and a Northwestern general agent. J.A. 372:8 to 373:9. Defender's president then wrote Northwestern's chief executive officer Donald Schuenke, stating: "We the Board of Directors and officers of Defender Industries feel we have been advised in a negligent and dilatory manner. We also have been threatened and lied to throughout this entire process." J.A. 817.[5] One of

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[5] The CEO was a lawyer and formerly served as general counsel for Northwestern. J.A. 453:14-18.

the Northwestern agents who had been closely involved in the sale of the policy also wrote the Northwestern CEO, stating: "[T]here is no question *we misrepresented, lied to, and used questionable business tactics* in trying to place the policy in question." J.A. 821 (emphases added).[6] In spite of this alarming factual backdrop, the senior Northwestern executive who purportedly investigated Defender's complaints informed Defender that Northwestern was unwilling to reform the policy and saw no reason to discipline the agents involved. *Defender* at 504; Pet. App. 57a, 35a.[7]

PROCEEDINGS BELOW

At the first trial, the jury returned a verdict for Defender of $106,513.74 actual damages, which was the exact amount of premiums paid by Defender to Northwestern during the nine months the policy was in effect, and $5 million punitive damages. *Defender* at 504; Pet. App. 57a. The district court reduced the punitive damages award to $10,000 and in the alternative ordered a new trial on punitive damages. The *en banc* Fourth Circuit reversed the reduction of the punitive damage award and remanded the case for a new trial only as to the amount of punitive damages. *See Defender* at 508; Pet. App. 66a. The court of appeals hinted that it would have preferred to let the jury's verdict stand but was constrained "by the proper exercise of appellate review to affirm" the new trial order. *Defender* at 507; Pet. App. 64a.[8]

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[6] Northwestern actually terminated this agent (Caroway) shortly after he wrote the letter to the CEO. J.A. 316-19.

[7] The record also showed that the Northwestern executive never contacted any of Defender's officers to discuss the complaint nor did he contact the Northwestern agent who had confirmed the misconduct in his letter to the CEO. J.A. 603:10-20.

[8] The Fourth Circuit stated: "We cannot say that the grant of a new trial on the issue of the amount of punitive damages constituted an abuse of discretion. Whether we *agree* with the ruling of the district court is not at issue here." *Defender* at 507; Pet. App. 64a (emphasis added).

At the second trial, the district court gave Northwestern every possible advantage. The district court required Defender to reprove much of its case, despite Defender's contention that certain issues were *res judicata*, Pet. App. 32a; the court admitted into evidence certain documents offered by Northwestern that the district judge had excluded at the first trial, *id.*; the court allowed Northwestern to offer evidence in *mitigation* that was not introduced at the first trial, *id.*; and the court charged the jury in accordance with *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991), as Northwestern requested. *See id.*

Nonetheless, the evidence was in several critical respects more damaging to Northwestern than at the first trial, *see* pp. 23-25, *infra*, and the jury returned a verdict of $25 million in favor of Defender.

As part of its campaign to misrepresent the procedural safeguards it received below, Northwestern provides only a cursory description (Pet. 7) of the district court's post-trial review, which the court of appeals rightly praised as a "thorough, well-reasoned opinion" and affirmed in a *per curiam* decision. Pet. App. 5a.[9] The district court, after canvassing all relevant evidence in the case, explained that "the pertinent evidence demonstrates quite forcefully that punitive damages were appropriate in this case." Pet. App. 28a. Having reached that conclusion, however, "the court [was] constrained to conclude that a punitive award of $25 million, even given the highly inappropriate conduct which occurred here, is excessive and must be reduced." *Id.* at 28a-29a. The court explained that, "if one looks solely at the ability of the wrongdoer to pay, a $25 million dollar award might be justified. However, the ability of a financially sound defendant to pay a punitive award is but one of many factors which must be considered." *Id.* at 30a.

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[9] The court of appeals' opinion, no doubt because it faithfully applied settled law in an uncontroversial manner, was unpublished. In the Fourth Circuit, such opinions are not binding precedent. *See* Fed. R. App. P., Fourth Circuit Rules & Internal Operating Procedures ("I.O.P."), I.O.P. 36.5 and 36.6.

In reducing the award, the district court also ruled that "'any penalty imposed should bear a relationship to the nature and extent of the conduct and the harm caused, including the compensatory damage award made by the jury.'" *Id.* at 30a (citation omitted). The district court concluded: "Giving due consideration to the relationship to the harm caused, other penalties for the conduct which occurred, improper profits and the plaintiffs' costs, and the ability of the defendant to pay, the court finds and concludes that $5 million is the most that a reasonable jury could award by way of punitive damages in this case." *Id.* at 31a.

I. THE FIRST QUESTION IS NOT PROPERLY PRESENTED AND HAS NO MERIT

In its first question presented, Northwestern invites this Court to ruminate "[w]hether, in a diversity case, a federal court is barred by the Seventh Amendment from reviewing an award of punitive damages under state law standards and procedures." Pet. at i (quoting first question presented). Whatever interest such a topic might hold, this is not the case in which to review it. Here, the court of appeals' decision below simply does not mention the issue, *see* Pet. App. 4a, largely because nothing in this case turns on it. The South Carolina "state law standards and procedures" are *less protective* of a defendant's rights than their federal counterparts and, accordingly, Northwestern in the courts below urged the *rejection* of "state standards and procedures" and the *adoption* of the federal approach. The district court applied both federal *and* state law in granting Northwestern a $20 million remittitur. There is simply no occasion to reach the Seventh Amendment question.

A. THE DISTRICT COURT APPLIED THE SOUTH CAROLINA LAW URGED BY NORTHWESTERN IN ITS PETITION

Northwestern devotes most of its presentation to an analysis of *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991), as if it were seeking review of that decision. Strikingly

absent from the Petition for Certiorari is an analysis of the proceedings in *this* case. Perhaps Northwestern's omission can be explained by the fact that the court of appeals relied not simply on *Mattison*, but on this Court's decision in *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989). *See* Pet. App. 4a. Moreover, the district court, in imposing a substantial remittitur, specifically cited and invoked *Gamble v. Stevenson*, 406 S.E.2d 350 (S.C. 1991), the very South Carolina decision that Northwestern now argues in its first question presented that the court did *not* apply. *See* Pet. App. 29a.

The district court, quoting from *Gamble*, explained that

> the punitive award must not be "grossly disproportionate" to the severity of the offense. This proposition was recognized by the South Carolina Supreme Court in *Gamble*, 406 S.E.2d at 354 ('upon completing its review, *dedicated to the postulate that no award be grossly disproportionate to the severity of the offense*, the trial court shall set forth its findings on the record')." * * * *Application of the foregoing principle* to the punitive award here leads to the inescapable conclusion that the award is grossly disproportionate to the severity of the conduct which occurred here.

Pet. App. 29a-30a (second emphasis added). Amazingly, Northwestern completely ignores *Gamble*'s critical role in the district court's post-trial review.

Northwestern cannot deny that the district court examined all of the factors articulated in *Gamble* for the post-trial review of punitive damages awards, and more.[10] Indeed, the district

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[10] The post-trial factors adopted by the South Carolina Supreme Court in *Gamble* are: "(1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related

court noted that the jury instructions in this case, based on the Fourth Circuit's ruling in *Mattison*, "borrow[ed] heavily from the *Gamble* standards" for post-trial review and were "'derived from *Gamble*.'" Pet. App. 12a (citation omitted).[11] Necessarily, the

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to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) as noted in *Haslip*, 'other factors' deemed appropriate." 406 S.E.2d at 354.

[11] Contrary to Northwestern's abbreviated reference to the "four factors" which were instructed to the jury in this case, Pet. 14, the district court instructed the jury as follows:

> The first category is the relationship to the harm caused. Any penalty, that is to say any punitive damage award you impose, should take into account the reprehensibility of the conduct, the harm caused, the defendant's awareness of the conduct's wrongfulness, the duration of the conduct, and the likelihood that the award will deter the defendant or others from like conduct, and also concealment, if any.
>
> Thus any penalty imposed should bear a relationship to the nature and extent of the conduct and the harm caused including the compensatory damage award made by the jury.
>
> The second factor that you should consider is other penalties for the conduct. Any penalty imposed by the jury should also take into account as a mitigating factor any other penalty that may have been imposed or which may be imposed for the conduct involved including any criminal or civil penalty, or any other punitive damages award arising out of the same conduct.
>
> The third factor that you must consider is the improper profits, if any. The amount of any penalty may focus on depriving the defendant of profits derived from the improper conduct.
>
> Fourth, the final element relates to the ability to pay. The defendant's wealth or lack of wealth is a relevant factor. The award of punitive damages should be sufficient to appropriately punish the defendant for its conduct but not to the extent to affect economic bankruptcy.
>
> There is no mathematical formula for determining the amount of punitive damages to be awarded. However, the factors I have discussed with you in this charge must be considered by you in determining the award of punitive damages.

district court's post-trial review, which inquired as to whether the evidence in this case met those standards, encompassed the *Gamble* factors for post-trial review.[12] Indeed, the district court's review touched on each one, as well as on many others.[13]

> I instruct you that South Carolina law requires a meaningful individualized assessment of appropriate deterrence and retribution in establishing the appropriate amount of punitive damages.

J.A. 707-08.

Northwestern's statement that the Fourth Circuit in *Mattison* "reduce(d) most, but not all, of the eight *Gamble* post-verdict review factors into four criteria," Pet. 11, and thereby implying certain substantive law factors had been deleted, is grossly misleading. If anything, the four "criteria" articulated in *Mattison* include all of the *Gamble* factors plus the *Haslip* factors which provide even greater guidance and instruction to the jury in its deliberations.

[12] The Fourth Circuit noted that "[i]n assessing the appropriate amount of the nisi verdict the district court carefully addressed the factors the jury was to consider in awarding punitive damages and analyzed the evidence presented in a thorough, well-reasoned opinion." Pet. App. 4a-5a.

[13] For example:

(1) Defendant's degree of culpability — The district court found that Northwestern was guilty of intentional "multi-tiered wrongdoing," including "fraudulent conduct, threats of reprisal, and concealment." Pet. App. 28a. "[T]he evidence was susceptible to the inference that high ranking Northwestern officials participated in the fraud." *Id.* The court pointed to Northwestern's claim that "the refund promise, if carried out, would have been illegal under South Carolina law" and to Defender's argument "that Northwestern should be severely punished for allowing its agents to make a promise to do what they knew to be an illegal act." *Id.* at 26a-27a.

(2) Duration of the conduct — The district court found that Northwestern's wrongdoing spanned a sustained period of time and included a fraudulent promise, a "refus[al] to reform the policy as promised and refus[al] to refund the premium," and "a direct threat that Northwestern could cause Defender to lose one of its largest customers in the event Defender canceled its policy." Pet. App. 25a.

(3) Defendant's awareness or concealment — The district court explained: "As noted by the Fourth Circuit, the evidence was susceptible to the inference that the upper echelon of Northwestern's management was aware of the misconduct and attempted to conceal it. On retrial, it was

Northwestern attempts to argue that *Gamble*, in "heed[ing] the message of *Haslip*," created its own "similar system for independent judicial review of punitive damage awards," Pet. 10, which is supposedly more constraining than the review performed by the district court and the Fourth Circuit in this case. Northwestern's argument is a gross mischaracterization of South Carolina law and of the proceedings in this case.

Northwestern studiously avoids defining what it means by "independent" review. It obviously means to leave the impression that South Carolina courts review punitive damages awards according to a *de novo* standard, but that is simply incorrect. The words "independent" or "*de novo*" do not appear in *Gamble*. Indeed, *Gamble* explained that, "[i]n South Carolina, post-trial relief in the form of motions for judgment notwithstanding the verdict, new trial, or new trial *nisi* are available to defendants claiming a verdict excessive. *See* S.C.R.C.P. Rules 50 and 59." 406 S.E.2d at 354. Those rules are in relevant part the mirror

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revealed that in spite of the first award, Northwestern has still failed to discipline any of the agents involved." Pet. App. 26a.

(4) Existence of similar past conduct — The district court credited Northwestern on this factor, noting that "[t]here was no showing that the conduct which occurred here was part of a normal pattern or practice by Northwestern." Pet. App. 29a.

(5) Likelihood the award will deter the defendant or others from like conduct — The district court observed that, "although the South Carolina Insurance Commission had, and retains, the power to sanction Northwestern administratively, no such action has been taken by the insurance commission in seven years since Northwestern's fraudulent conduct occurred. Thus, Defender was able to argue that punitive damages were necessary as a deterrent in this case because, quite obviously, the administrative sanctions had not been invoked and, in all likelihood will not be invoked in the future." Pet. App. 27a-28a.

(6) Whether the award is reasonably related to the harm likely to result from such conduct — The district court gave "due consideration to the relationship to the harm caused." Pet. App. 31a.

(7) Defendant's ability to pay — The district court emphasized that "the ability of a financially sound defendant to pay a punitive award is but one of many factors which must be considered." Pet. App. 30a.

(8) "Other appropriate factors" — The district court looked to "other penalties for the conduct which occurred, improper profits and the plaintiffs' costs." Pet. App. 31a.

image of Fed. R. Civ. P. 50 and 59 under which post-trial review occurs in federal court. *See* West Publishing Co., S.C. R. Civ. P. 50 and 59 (1992), Notes ("This Rule 50 conforms to the Federal Rule" with minor exceptions (not relevant here)); ("This Rule 59 is substantially the Federal Rule"). In fact, there is no requirement under *Gamble* that a state trial court must consider any specific factors that the state supreme court enumerated; the decision's language is purely precatory. *See* 406 S.E.2d at 354 ("the trial court . . . *may* consider the following [factors]") (emphasis added). *Gamble* also stressed that "[t]he amount of damages, actual or punitive, remains largely within the *discretion of the jury*, as reviewed by the trial judge." 406 S.E.2d at 355 (emphasis added). The *Gamble* court cited a South Carolina case which underscored that, "in the assessment of punitive damages, there is no exact monetary standard which can be used," and that therefore that "courts are generally reluctant to disturb an assessment of damages by the jury." *Fennell v. Littlejohn*, 125 S.E.2d 408, 414-15 (S.C. 1962) (cited at 406 S.E.2d at 355).

South Carolina has confirmed subsequent to *Gamble* that a trial court may set aside a punitive damages award only according to traditional common-law standards; that is, a court may set aside or reduce an award if it concludes that the award evinces "undue liberality" in light of the evidence, and it should set aside the verdict completely "if a verdict is so grossly excessive and shockingly disproportionate that it indicates the jury was motivated by passion, caprice, prejudice, or other consideration not founded on the evidence." *Caldwell v. K-Mart Corp.*, 410 S.E.2d 21, 25 (S.C. Ct. App. 1991).

In fact, in its motion for a new trial before the district court, Northwestern recognized the proper South Carolina standard: "In South Carolina, a punitive damages award must not be 'grossly disproportionate to the severity of the offense' (*Gamble v. Stevenson*, 406 S.E.2d 350, 354 (S.C. 1991)) and cannot stand if it is 'grossly excessive.' *Sanders v. Prince*, 403 S.E.2d 640, 642 (S.C. 1991)." Defendant's Memorandum in Support of Motions for New Trial and Certification, at 2 (filed

Feb. 18, 1992). Northwestern made no mention of the "independent review" and consideration of "other factors and evidence" (Pet. 10) to which it now claims it was entitled. Not only does this constitute a waiver of Northwestern's current objection, but it also reveals the utterly fictitious legal basis on which Northwestern's first question rests.

The most Northwestern can muster in its petition is that, in state court, a trial judge "would be required to make appropriate findings and to 'explain the conditions that require a particular award of punitive damages.'" Pet. 15 (citation omitted). But that is precisely what the district court in this case did in reducing the award from $25 million to $5 million. See note 13, *supra*. If anything, the district court's scrutiny of the award in this case was more rigorous than the analysis that a South Carolina trial court would have been required to undertake.[14]

In a case where post-trial review has reduced a punitive award by four-fifths, it not credible for a defendant to complain that the review was "highly deferential." Pet. 13. In short, the first question presented is a mirage, based on a misrepresentation of South Carolina law and of the proceedings below.

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[14] Northwestern also criticizes the federal appellate standard of review on the ground that it "asks only the extremely relaxed question whether the district court abused *its* discretion." Pet. 15 (emphasis in original). Northwestern neglects to mention that the South Carolina Supreme Court announced the *very same standard* for appellate review in *Gamble*: "this Court's review is limited. . . . Only when the trial court's discretion is abused, amounting to an error of law, does it become the duty of this Court to set aside the award." 406 S.E.2d at 355. *See also Fennell v. Littlejohn*, 125 S.E.2d 408, 414 (S.C. 1962) (cited approvingly on this point by *Gamble*, 406 S.E.2d at 355) ("it is well settled that the granting of a new trial on the ground that the verdict is so excessive as to indicate caprice, passion or prejudice on the part of the jury is in the discretion of the trial judge and his decision thereon will not be disturbed unless abuse of discretion is shown"); *Caldwell v. K-Mart Corp.*, *supra*, 410 S.E.2d at 25 ("The *appellate court* will not set aside a verdict for undue liberality") (emphasis added).

B. IN ANY EVENT, NORTHWESTERN TOOK THE CONTRARY POSITION BELOW AND HAS THEREFORE WAIVED ITS OBJECTION

Even assuming that the district court had not applied the *Gamble* standard, Northwestern would be estopped from complaining now. Northwestern *never requested* the kind of "independent" review to which it now claims it was entitled. Indeed, before the district court, Northwestern consistently took the position that the Fourth Circuit's *Mattison* decision was controlling and, more specifically, that *Gamble* did not apply to the proceedings because it was in federal court. In a memorandum in support of a motion in limine filed prior to the second trial, for example, Northwestern argued that "[t]he traditional South Carolina law of punitive damages no longer applies to this federal diversity case." Defendant's Memorandum in Support of Its Motion in Limine, at 1 (filed Nov. 19, 1991). "[B]ecause of the limitations of the Seventh Amendment and the requirements of the Federal Rules of Civil Procedure (Rules 50(b) and 59), *federal diversity courts can no longer follow* the *Gamble* modified South Carolina punitive damages regime." *Id.* at 2 (emphasis added). This theme persisted into the court of appeals, where Northwestern noted the "Seventh Amendment deferential limitation on [federal] court review of excessive punitive verdicts." Reply Brief of Appellant, at 3 (filed Sept. 11, 1992).

Northwestern saw strategic advantages in having the application below of the punitive damages procedures prescribed in *Mattison*,[15] and it was able to persuade the district court that extensive pre-verdict procedures (such as *Mattison*'s elaborate

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[15] The district court explained that "*Northwestern* successfully argued that because the intervening *Mattison* decision had explicitly recognized that 'other penalties for the conduct,' . . . . , the issue should be fully developed on retrial." Pet. App. 27a (emphasis added). "Additionally, *Northwestern* prevailed on nearly every legal issue in dispute at the second trial. That is to say, the court required Defender to reprove much of its case, . . .; and the court charged the jury in accordance with *Mattison*." Pet. App. 32a (emphasis added).

jury instructions) were necessary because the court's post-trial review was circumscribed by the Seventh Amendment.[16] Northwestern now takes precisely the opposite tack, claiming that jury instructions, no matter how detailed, can never be adequate and that what is really needed is more vigorous post-trial review. Pet. 14. Northwestern cannot have it both ways. If Northwestern had wanted the district court to apply *Gamble*, it should have so requested. Instead, Northwestern told the court that it *could not* apply *Gamble*, including its prescribed post-trial review. *Id* at 14. Northwestern's strategy is pure gamesmanship and should be rejected outright. Holding Northwestern's petition pending the decision in *TXO* would effectively reward this chicanery.

C. THERE IS NO "CIRCUIT CONFLICT"

Another of Northwestern's distortions is its claim that there is a "circuit conflict" regarding the Seventh Amendment. This is untrue. Indeed, it is unclear that Northwestern's description of the law is accurate even in the Fourth Circuit.

In the supposedly "conflicting" case of *American Employers Ins. Co. v. Southern Seeding Servs., Inc.*, 931 F.2d 1453 (11th Cir. 1991), for example, the Eleventh Circuit applied this Court's guidance in *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989):

> In reviewing an award of punitive damages, the role of the District Court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under [Federal Rule of Civil Procedure] 59, whether a new trial or remittitur should be ordered. The Court of Appeals should then review the District Court's determination under an abuse-of-discretion standard.

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[16] Northwestern no doubt realized that it suffered no downside from its argument, since the post-trial review by the district court would be the same under the so-called "*Mattison*" and "*Gamble*" approaches.

931 F.2d at 1458. This is the *same* passage on which the court of appeals below relied, Pet. App. 4a, and on which the *Mattison* court relied. *See* 947 F.2d at 108. It is thus difficult to perceive how any conflict could arise.

In fact, no conflict exists. The Eleventh Circuit in *American Employers Ins. Co.* did not even *mention* the Seventh Amendment, let alone analyze it. The Eleventh Circuit simply indicated that, as part of the determination of whether the jury's verdict was "within the limits set by state law" — that is, whether it met the traditional common-law standard of "excessiveness" — a district court should look to Alabama state decisions. 931 F.2d at 1458. This does not conflict with *Mattison*, which expressly noted that the Seventh Amendment permits a trial court to set aside a jury verdict on state-law grounds of excessiveness. *See* 947 F.2d at 108. The second clause of the Seventh Amendment, of course, permits courts to re-examine facts tried by juries so long as the courts act "according to the rules of the common law."[17] *Id.* at 107.

Similarly, the Fifth Circuit, in *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1778 (1992), never mentioned or considered the Seventh Amendment, although its decision is perfectly consistent with *Mattison*. In *Glasscock*, the Fifth Circuit noted that Texas courts had developed a multi-factored proportionality test, but simply as an elaboration of the common-law excessiveness standard: "This proportionality requirement is simply a tool to help Texas courts determine when an exemplary damage award is the product of the jury's passion rather than its reason." 946 F.2d at 1095. Accordingly, a federal court's application of the proportionality requirement implicates no Seventh Amendment concern at all.

It is also telling that Northwestern fails to give this Court a complete account of post-*Mattison* developments in the Fourth

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[17] In *Braswell v. Conagra, Inc.*, 936 F.2d 1169, 1176 (11th Cir. 1991), on which Northwestern also relies, Pet. 12, the court similarly did not mention the Seventh Amendment.

Circuit. In *Johnson v. Hugo's Skateway*, 949 F.2d 1338 (4th Cir. 1991), decided after *Mattison*, a panel of the court of appeals, explained the limits of *Mattison*'s analysis:

> We find misfounded concerns about the Seventh Amendment if such [post-trial] review is conducted by the district court. . . . [T]he district judge would be conducting a narrow review based upon the evidence in the record. We are not in the case of such review asking the district judge to consider factors that were not before the jury. Rather, we are simply suggesting that the district judge review the jury's factual determination to draw a *legal* conclusion (i.e., the reasonableness of the punitive damages award). Accordingly, this narrow review does not run afoul of the Seventh Amendment.

949 F.2d at 1351 n.6 (citation omitted and emphasis in original).

The Fourth Circuit reconsidered *Hugo's Skateway en banc*. The court did not expressly adopt the panel's analysis, but it squarely rejected the argument that a State's scheme for post-trial review is irrelevant to a federal court sitting in diversity. In carefully chosen language, the Court explained:

> if state law assigns the trial or appellate court a post-verdict role in assessing the reasonableness of a punitive damages award and specifies certain factors to be considered in making that assessment, . . . this body of substantive law must also be applied in federal court, but in a manner that permits consideration by *the jury* as the sole fact finder, rather than by the judge.

Johnson v. Hugo's Skateway, 974 F.2d 1408, 1416 (4th Cir. 1992) (*en banc*).

If certiorari were granted in this case, Northwestern would no doubt contend, consistent with both the panel and the *en banc* decisions in *Hugo's Skateway*, that the jury's role as sole fact

finder is not threatened by application of state-law standards to decide the legal question of whether a particular award is excessive. The Fourth Circuit *per curiam* decision that Northwestern asks this Court to review does not mention the Seventh Amendment with respect to the district court's post-trial review, *see* Pet. App. 4a, and it is unclear what role, if any, the Seventh Amendment played in the court of appeals' decision.

There simply is no reason for this Court to review an issue that has received so little attention in the lower courts. It is evident in light of *Johnson's Skateway* that the only circuit to even mention the Seventh Amendment in this context is quite unclear about its approach. This area of punitive damages law requires further percolation in the lower courts before it can become one for serious consideration by this Court.

D. NORTHWESTERN'S SEVENTH AMENDMENT THEORY HAS NO MERIT

Even if it were properly presented, Northwestern's Seventh Amendment theory would not warrant this Court's review. Northwestern's entire argument is premised on a misinterpretation of *Tull v. United States*, 481 U.S. 412 (1987). In that case, this Court held that the Seventh Amendment did not bar Congress from authorizing judges to assess civil penalties under a cause of action created by Congress in the Clean Water Act. Crucially, *Tull* concerned the first clause of the Seventh Amendment, not the second. Even if there were no right under the first clause of the Seventh Amendment to a jury determination of the amount of punitive damages, it would hardly follow that, where a jury assessment *has in fact occurred*, the entirely separate jurisdictional constraint of the second clause — that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law" — becomes meaningless. The second clause is an independent restraint on the power of federal courts and is completely unaffected by *Tull*. Northwestern's argument is a poor cousin to the sort of "greater-power-includes-the-lesser" notions that this

Court has rejected in so many contexts.[18]

Northwestern's argument is also foreclosed by *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991), which explained that, "[u]nder the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct." 111 S. Ct. at 1042. Quoting *Day vs. Woodworth*, 54 U.S. (13 How.) 363 (1852), this Court also noted that "[t]his has been always left to the discretion of the jury, as the *degree of punishment* to be thus inflicted must depend upon the particular circumstances of each case." 111 S. Ct. at 1042 (emphasis added).[19]

Northwestern's "practical" arguments (Pet. 15) in favor of its Seventh Amendment theory are also flawed. Northwestern asserts that punitive damages jury instructions, no matter how detailed, are ultimately unavailing because they inherently provide inadequate guidance. This Court has already rejected that view. *See Haslip*, 111 S. Ct. at 1044 (noting that juries are routinely afforded much greater discretion in many areas of the law). Northwestern quotes a statement by the district court discussing the "inherent tension" in assessing punitive damages, Pet. 14, but that quotation, like many aspects of the petition, is

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[18] *See, e.g., R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2543-44 (1992) (power to ban entire category of speech does not imply power to create viewpoint-based distinctions); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) (unconstitutional conditions doctrine means that State's power to ban "shouting fire in a crowded theater" does not include power to "grant[] dispensations to those willing to contribute $100 to the state treasury"); *Vitek v. Jones*, 445 U.S. 480, 490-491 n.6 (1980) (procedural due process applies to state-created property that State was under no obligation to provide in the first instance).

[19] In *Browning-Ferris Indus. v. Kelco Disposal*, 109 S.Ct. 2909, 2923 n.26 (1989), the Court observed the district courts operate under the "strictures of the Seventh Amendment," stating: "As a result, we are reluctant to stray too far from traditional common-law standards, or to take steps which ultimately might interfere with the proper role of the jury."

not what it seems. In fact, the district court's statement relates to the process of *post-trial review* and was not a criticism of the jury instructions. *See* Pet. App. 30a.[20]

II. THE SECOND QUESTION ALSO RESTS ON A DISTORTED VIEW OF THE FACTS BELOW AND HAS NO MERIT.

Northwestern claims that the punitive damages award is excessive but offers no constitutional standard by which to judge it. Evidently, Northwestern believes that this Court should simply constitutionalize the common-law "excessiveness" standard and embark on an *ad hoc*, case-by-case review of punitive damages awards. This Court, however, does not sit as the National Court of Tort Appeals, and Northwestern's "I-know-it-when-I-see-it" proposal is hardly designed to provide helpful guidance to the lower courts. The district court's thoughtful and balanced analysis fully protected Northwestern's rights; indeed, it saved the company $20 million. Northwestern neither needs nor deserves further assistance from this Court.

Northwestern's excessiveness argument is essentially an attempt to reargue the facts of the case. Northwestern contends, for example, that the award reflects the jury's decision to base the award on Northwestern's size and wealth. Pet. 19. Yet the district court's detailed jury instructions — which far exceeded the charge approved in *Haslip* — told the jury to consider wealth as only one factor, and as a factor that worked in *Northwestern*'s favor, as a limit on punitive damages: "The award of punitive damages should be sufficient to appropriately punish the defendant for its conduct but not to the extent to [e]ffect

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[20] Northwestern's dreaded spectre of forum-shopping, Pet. 15-16, is belied (a) by the fact that, even under Northwestern's view of *Mattison*, any state-law factors for post-trial review can simply be incorporated into the jury instructions issued by a federal court sitting in diversity, and (b) by Northwestern's *own behavior* in this case: Northwestern eagerly sought application of the federal rather than the state scheme.

economic bankruptcy." J.A. 708.[21]

Moreover, the district court, in reducing the jury award from $25 million to $5 million, explained that, "in this case, if one looks solely at the ability of the wrongdoer to pay, a $25 million punitive award might be justified. However, the ability of a financially sound defendant to pay a punitive award is but one of many factors which must be considered." Pet. App. 30a. Thus, if the jury award was attributable to Northwestern's wealth, Northwestern's objection was amply answered by the district court's remittitur.

Contrary to Northwestern's contention that its size and wealth was the reason for two large punitive awards, two juries, the district court and the Fourth Circuit have all found this repugnant conduct to warrant a severe punishment.[22] Although Northwestern generally objected to the introduction of evidence concerning its net worth — but not on federal constitutional grounds — Northwestern also offered, somewhat amazingly, to stipulate to the jury it had an "unlimited ability to pay any punitive award" instead of introducing evidence of its net worth. J.A. 37. This proposed stipulation, however, would have actually given the jury considerably less guidance and limitations than either *Gamble* or *Mattison*, as the jury would have had no "ceiling" or other "boundaries" for the award.[23]

Northwestern also contends that the award could not have been justified by the potential harm that Defender faced, and that

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[21] Under South Carolina law, a state court jury is simply instructed that the defendant's "ability to pay" is a relevant factor in assessing the amount of punitive damages. *Gamble*, 406 S.E.2d at 354.

[22] The district court after the second trial stated it had "sided with Northwestern on the two most difficult evidentiary issues and allowed in new testimony regarding mitigating factors." Pet. App. 28a.

[23] Northwestern also complains its wealth was "heavily emphasized in respondent's closing argument." Pet. 6-7. While respondent submits the closing argument was proper and consistent with the record, Northwestern did not object to any portion of respondent's closing argument and cannot now be heard on this issue.

$107,000 is "the most generous possible estimate" of the injury it inflicted. Pet. 2, 18-19. This is simply false. Pursuant to Northwestern's request, the district court charged the jury that it could consider such factors as "the reprehensibility of the conduct," "the defendant's awareness of the conduct's wrongfulness," and "concealment." J.A. 707. Evidence of Northwestern's overall course of conduct was necessary so that "the new jury [could] acquire an appreciation of the wrongfulness of the conduct . . . in fashioning an appropriate award." Pet. App. 8a. Accordingly, the jury was entitled to consider Northwestern's reaction when Defender confronted it with the fraudulent promise that had induced it to purchase the insurance policy: "when Defender sought to assert its rights under the promise, Northwestern threatened to cause Defender's largest customer to take its business elsewhere." Pet. App. 7a. "This one customer generated revenues for Defender of $2 million to $3 million per year." *Id.* at 25a n.6. The district court ruled — in what is a fact-intensive decision that does not warrant this Court's review — that Northwestern's "threats of reprisals" were part of "the multi-tiered wrongdoing" that "demonstrate[d] quite forcefully that punitive damages were appropriate," *id.* at 28a, and, in particular, that made a $5 million award reasonable. The district court also noted that it was law of the case that, based on the first trial, all of the wrongful "acts of Northwestern's agents are to be imputed to the company." Pet. App. 16a. Northwestern thus cannot claim that the potential harm was limited to only $107,000.

Northwestern also makes much of the fact that, after the first trial, the district judge reduced its punitive liability to $10,000. Pet. 17. Aside from the fact that the *en banc* Fourth Circuit reversed this ruling, the district judge at the second trial explained at length the reasons that a larger award was warranted. Pet. App. 32a. The court noted the evidence at the second trial was even "more damaging to Northwestern" in three specific areas. *Id.*

"First, Northwestern had not taken steps to fire or otherwise discipline its employees who were involved in the

fraudulent conduct, despite the fact that the 1985 conduct had been unanimously found to be fraudulent by a jury, a judge of this court, and an en banc panel of the United States Court of Appeals for the Fourth Circuit." Pet. App. 32a.[24] Incredibly, the evidence showed one of the agents had actually been *promoted* since the first trial. J.A. 129:7-14. Northwestern's claim that the misconduct was an isolated incident not likely to be repeated is belied by the fact that the "the evidence was susceptible to the inference that high ranking officials participated in the fraud." Pet. App. 28a.

Second, the evidence at the second trial also established that Northwestern's fraudulent promise was illegal under South Carolina law, a fact noted by the district court that was "not made known to the first jury and not argued to Judge Henderson." Pet. App. 32a. At the second trial, Northwestern — now faced with a fraud verdict and a retrial only on the amount of punitive damages — unsuccessfully attempted to inject "illegality" as the reason it had refused to refund Defender's premiums as promised. A Northwestern agent testified at the second trial "[t]he promise was made and I am terribly sorry." J.A. 277:25. The jury clearly rejected this belated excuse after this agent also admitted he had denied during his testimony at the first trial that a fraudulent promise *had even been made*. J.A. 278:12-20. Even more astonishing, the same Northwestern agent testified at the second trial that the Home Office also knew that the promise to refund premiums was illegal at the time Northwestern refused Defender's request for a refund. J.A. 279:17-25 to 280:1.

Third, evidence at the second trial revealed that Northwestern's misconduct was so serious that Northwestern risked certain disciplinary measures by the South Carolina Insurance Depart-

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[24] A Northwestern senior vice president testified at the second trial the Home Office committee which investigated agent fraud had never even discussed Defender's complaints nor had it taken any disciplinary action against any of the agents since the fraud verdict in the first trial. J.A. 455:16-25; 456:1-5.

ment, including the *revocation* of its license to sell insurance in South Carolina. Pet. App. 32a. The district court instructed the jury that under South Carolina law (S.C. Code Ann. § 38-55-50, Pet. App. 26a) it was illegal for an insurance company or agent to promise a premium refund as an inducement to purchase a life insurance policy and that "any insurance company that itself engages in any wrongful conduct as defined in state law may be subject to penalties of monetary fines and/or *revocation or suspension* of the authority to sell insurance policies in South Carolina." J.A. 709 (emphasis added). Indeed, this jury instruction was actually prepared and submitted to the district court by Northwestern. J.A. 708:16 to 709:23 (Northwestern's "Request to Charge No. 16" as read verbatim to the jury).[25] This jury instruction on the statutory penalties, together with the evidence showing Northwestern earned premium income in South Carolina alone of $20 million a year, J.A. 522:6-10, rang the death knell for Northwestern. The state-prescribed penalty, had it been enforced, would have already resulted in monetary "damages" to Northwestern many times greater than the district court's remittitur of $5 million or, for that matter, the jury verdict of $25 million.

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[25] Northwestern insisted on this jury instruction designed to indicate to the jury that it faced possible loss of its license as a result of "any wrongful conduct" — so that punitive damages would not appear to be the only means of punishing Northwestern. Once this strategy failed, Northwestern, in yet another reversal, argued precisely the opposite in the Fourth Circuit. It contended that any reference to this loss-of-license point for the purpose of establishing the seriousness of Northwestern's offense was legally barred because, in fact, under applicable South Carolina regulations "the Northwestern license *could not* have been suspended for the unauthorized tortious conduct of [its agent]." Reply Brief of Appellant, at 11 (emphasis added). Northwestern's new thinking on this subject is obviously irrelevant under the principles of estoppel, invited error, and Fed. R. Civ. P. 51. Moreover, Northwestern's reply point in the Fourth Circuit ignored that Northwestern had been found to have authorized or ratified the misconduct at issue. *See* Pet. App. 15a-16a ("The earlier trial in this action resulted in a jury determination that Northwestern was liable for the actual and constructive fraud of its agents. . . . [F]or purposes of the acts complained of in this case, the acts of Northwestern's agents are to be imputed to the company.").

Finally, Northwestern embarks on a comparative review of other punitive damages awards in the state and federal courts of South Carolina. Pet. 17-18. But Northwestern conspicuously fails to cite any case (state or federal) from South Carolina or any other jurisdiction which involved fraudulent conduct — a threat to interfere with a business relationship that would have resulted in the loss of millions of dollars and hundreds of jobs — and an attempted concealment by the highest executives in the company. Even more significantly, however, Northwestern also fails to cite any reported case in South Carolina or any other jurisdiction where the state-prescribed statutory penalties which were given to the jury in its instructions could have had a truly profound and punitive impact.

For all these reasons, the second question presented has no merit. The second question similarly provides no basis to hold the petition pending this Court's decision in *TXO Production Corp*. (It is clear that Northwestern's first question presented is not implicated by *TXO*, a case which arose in state court rather than federal court.)

This case bears no resemblance to *TXO*. In *TXO*, the trial and appellate courts upheld the jury's verdict in its entirety; here, the district court, in a searching and balanced review, reduced the award by 80%. In *TXO*, the defendant was subjected to what it described as a "really stupid/really mean" standard of review; here, Northwestern prevailed below on virtually *every* significant legal issue and received precisely the kind of review it requested, which was in fact *more rigorous* than the legal standard it now defends in this Court. In *TXO*, the defendant claimed that the award was a product solely of its wealth; here, the district court's review ensured that such was not true in this case. In *TXO*, the defendant claimed to have preserved its objections below; here, any claims that Northwestern might assert have been procedurally waived. In *TXO*, the defendant claimed that the award bore no rational relationship to the plaintiff's loss or to the legislatively prescribed penalties for the defendant's misconduct; here, the jury was able to consider Northwestern's threatened reprisal, which would have caused $2 million to $3

million in annual losses to Defender, in setting punitive damages. Moreover, imposition of the legislatively established penalty for Northwestern's misconduct would have cost it $20 million per year in lost premium income.

Accordingly, any decision in *TXO* will not affect the result below.

CONCLUSION

The Petition for Certiorari is without merit and rests on serious distortions of the record and of the decision below. It should be denied.

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No. 92-1708

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

DEFENDER INDUSTRIES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The petition in this case demonstrates (1) that the Fourth Circuit follows an aberrant rule, purportedly required by the Seventh Amendment, in punitive damages cases tried in diversity, and (2) that the $5 million in punitive damages awarded here violates the due process clause. We argued that both issues merit review and that, at a minimum, the case should be held pending disposition of *TXO Production Corp. v. Alliance Resources Corp.*, No. 92-479. Respondents attempt to avoid scrutiny of the Seventh Amendment issue by suggesting that the Fourth Circuit's unique rule was not followed in this case and that the issue is not properly presented in this Court. As for our second claim, respondents first attempt, unconvincingly, to justify the $5 million punitive award, and then proffer superficial distinctions between this case and *TXO*. None of these arguments—much less the empty verbal jousting littered throughout respondent's

brief in opposition—provides a proper basis for denying review or, alternatively, holding the case pending *TXO*.

1.a. Respondents first claim that the courts below actually followed South Carolina standards and procedures just as they would have been applied in a state court punitive damages case. Br. in Opp. 8-14. This argument is wrong and, indeed, flatly contradicted by the district court's opinion, on which *respondents* claim to rely. In *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991), the Fourth Circuit clearly held that the post-verdict judicial review process adopted by the South Carolina Supreme Court in *Gamble v. Stevenson*, 406 S.E.2d 350 (S.C. 1991), in response to this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), could *not* be applied in federal court because of the Seventh Amendment. *See* Pet. 10-12. *Mattison* was followed in this case and its significance fully appreciated. The district court directly acknowledged that "[t]he *Mattison* decision significantly altered the law of punitive damages." Pet. App. 8a. In particular, confirming our position, the court explained: "The Fourth Circuit was unable to establish a post-trial review mechanism, as the South Carolina Supreme Court had done in *Gamble*, because a federal district court's review of a jury verdict is subject to Seventh Amendment constraints which are not imposed on any state-prescribed post-trial review." *Id.* at 12a.

As we explained in the petition (at pp. 10-11), the main difference between the South Carolina procedure and the procedure mandated for federal courts in *Mattison* is in the degree of independence exercised by the trial judge in reviewing punitive damage awards. In state court, the jury is not told about the eight *Gamble* factors; rather, these factors are applied in the first instance by the trial court, which makes its own relevant findings. In federal court, by contrast, the factors are applied by the jury, and that application is deferentially reviewed by the trial judge.

The district court not only recognized this basic difference between *Gamble* and *Mattison*; it specifically implemented the distinction when it reviewed the punitive award in this case. The court made no independent review of the evidence but, rather, frankly acknowledged that "[its] opinion recites the evidence in the light most favorable to Defender." Pet. App. 28a n.8. And, to the same effect, the court approved an award that it characterized as "the *maximum* that this court finds a reasonable jury could award in light of the evidence in this case." *Id.* at 31a (emphasis in original). *Gamble* would have authorized, if not mandated, much more careful scrutiny and analysis. *See* Pet. 15.[1]

In sum, *Mattison* plainly requires federal courts applying South Carolina law to follow a *different* approach from state courts in punitive damages cases. As we explained in the petition, moreover, the *Mattison* rule conflicts with the approaches followed in the Eleventh and Fifth Circuits, both of which require federal judges to apply the identical criteria used by state judges to review punitive awards, even if those criteria diverge from the standards given to the jury. *See* Pet. 12.[2] The Fourth

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[1] Further attempting to marginalize the significant distinctions between *Mattison* and *Gamble*, respondents incorrectly characterize *Caldwell v. K-Mart Corp.*, 410 S.E.2d 21, 25 (S.C. Ct. App. 1991), as confirming that substantial deference is accorded to jury verdicts in state court. In fact, what *Caldwell* confirmed was that trial judges have the "power and responsibility" to set aside any punitive verdict that they consider "unduly liberal." *Id.* at 24-25. This is the very standard that was relied on by the South Carolina Supreme Court in *Gamble*, as it set out eight factors to guide the trial court's review. *See* 406 S.E.2d at 354.

[2] Respondents attempt unsuccessfully to harmonize these decisions with *Mattison* by ignoring the fact that the Fourth Circuit expressly bars a federal court from adopting any state procedure under which the court "evaluate[s] a jury's verdict based . . . on a legal standard not given to the jury." 947 F.2d at 108. That is precisely what the Fifth and Eleventh Circuits have required.

Circuit's Seventh Amendment analysis is also wrong.[3] It should be reviewed by this Court.

b. Respondents further argue, with respect to the *Mattison* issue, that "Northwestern took the contrary position below and has therefore waived its objection." Br. in Opp. 15. This argument is misleading and incorrect. It is true that in the district court petitioner acknowledged that *Mattison* governed; after all, the case was binding precedent in the Circuit and to argue otherwise would have been futile. But petitioner further argued that *Mattison* did *not* allow the jury to consider the defendant's financial condition, except to the limited extent of assuring that an award does not bankrupt the defendant. *See* Pet. App. 10a-13a. The district court then rejected that reading and instructed the jury to take into account petitioner's wealth. *Ibid.*

On appeal, petitioner urged its reading of *Mattison* as a basis for reversal, while preserving the alternative argument that "[i]f *Mattison* did not remove wealth from the penalty formula, its revision of *Gamble* was [constitutionally] impermissible." Br. of Appellant at 14 n.6. It explained that it offends due process to tell a jury to consider the wealth of a multi-billion-dollar company (along with other unrelated factors), and then to review whatever verdict emerges under deferential federal stand-

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[3] Respondents virtually concede that, under *Tull v. United States*, 481 U.S. 412 (1987), there is no Seventh Amendment right to a jury trial on the amount of punitive damages to be awarded in a case. Br. in Opp. 19. They argue, however, that if the issue *is* presented to the jury, any review of the jury's award is constrained by the second clause of the Amendment, which states that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." *Ibid.* This makes little sense. It stands to reason that the second clause was merely intended to prevent evasion of the right to a jury trial created in the first clause. The two clauses should therefore be seen as coextensive in terms of the situations where they come into play.

ards rather than "quasi-*de novo*" state standards. *Id.* at 28-31. In the course of making this argument, it specifically asserted that such due process concerns should take precedence over the Seventh Amendment. *Id.* at 29 n.28. *See also id.* at 14 n.6 (noting the *Erie* issue created by *Mattison*). The Fourth Circuit, however, ruled that the district court had "properly decided the legal issues," and that the court's "determination of the appropriate amount of the nisi verdict was not . . . a denial of due process." Pet. App. 5a.

On this record, petitioner did what was necessary to preserve the challenge to the *Mattison* rule, which was applied to this case and which we now ask this Court to review. While petitioner did not argue the Seventh Amendment issue at any length, it would have been useless to do so: both the district court and the Fourth Circuit panel were bound by *Mattison* and, before briefing was completed in the court of appeals, the Fourth Circuit, *en banc*, had expressly adopted the Seventh Amendment analysis of *Mattison* and applied it to Virginia cases in federal court. *See Johnson v. Hugo's Skateway*, 974 F.2d 1408 (4th Cir. 192) (*en banc*).[4] This petition thus constitutes the first time that petitioner had an opportunity to challenge *Mattison* directly. In such a context, surely it must be sufficient to preserve an issue by calling it to the attention of the court of appeals. *Cf. United States v. Williams*, 112 S. Ct. 1735, 1740 (1992) (refusing to require that "a party demand overruling of a squarely applicable, recent circuit precedent, even though that precedent was established . . . over the party's vigorous objection . . . and even though no 'intervening developments in the law' . . . had occurred"); *Sure-Tan, Inc.*

[4] Respondents' suggestion that *Johnson* calls into question the continuing validity of the *Mattison* approach is contradicted by the very language from *Johnson* that they quote, which makes clear that, unlike in state court, in federal court the jury, not the judge, is the "sole fact finder" on punitive damages. Br. in Opp. 18 (quoting *Johnson*, 974 F.2d at 1416).

v. NLRB, 467 U.S. 883, 896 n.7 (1984) (party allowed to assert issue not previously raised, in light of intervening decision that made the claim substantial); *Standard Indus., Inc. v. Tigrett Indus., Inc.*, 397 U.S. 586, 587-88 (1970) (Black, J., dissenting) (same) (citing cases).

2. Turning to the second issue—the constitutional excessiveness of the punitive award—respondents make essentially three points. First, they argue that the petition is deficient because it fails to propose specific standards for substantive due process review of punitive damage awards. Br. in Opp. at 21. In fact, however, petitioner simply suggested that this would be a good case in which to develop such standards, while properly deferring further discussion of that merits issue until after review is granted.

Second, respondents attempt to defend the $5 million penalty here on the ground that (1) it is less than the $25 million the jury initially awarded (*id.* at 22), and (2) it is commensurate with the potential damage associated with a threat made by petitioner's agent (*id.* at 23). As noted in the petition, however, the district court selected the $5 million as the maximum amount that a rational jury could award, taking into account petitioner's immense "ability to pay." Pet. 19 n.18. This case thus represents a paradigmatic example of a "windfall" occasioned by the "good fortune [of having] a defendant with a deep pocket." *Haslip*, 111 S. Ct. at 1045.

As for the "threat," it is noteworthy that respondents are now defending the judgment below by reference to a tort *other than* the commercial fraud charged in the complaint and found by the jury. In so doing, moreover, they ignore the fact that the sole alleged purpose of this threat—made by an agent and wholly unknown to petitioner—was to induce Defender to maintain in full force a policy paying premiums of less than $107,000 per year. It is that potential injury that must rationally be related to a punitive damage award of $5 million.

Finally, respondents attempt to suggest that this case bears no relation to the pending *TXO* case. Br. in Opp. 26-27. But pointing to minor factual differences between the cases does nothing to undercut the fundamental reality: this case, like *TXO*, involves the claim that a corporation was exposed to a constitutionally excessive penalty for a minor commercial tort, because of its wealth. It is therefore plainly appropriate to defer disposition of this case pending *TXO*, if the Court decides not to grant review at this time.

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